

# INDEX.

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## ABATEMENT.

**CORPORATION: STOCKHOLDER: ABATEMENT.** A proceeding by motion under Revised Statutes, section 736, to subject a stockholder to execution on a judgment against the corporation to the extent of the unpaid balance of his stock, does not abate on the death of the stockholder. *Marks v. Hardy*, 232.

## ACCRETIONS.

1. **LAND TITLE: ACCRETIONS.** Where the intermediate space between a survey on the main land of the Missouri river, and a surveyed island, at the times of the surveys, consisted of a slough, and since then the slough has so filled up as to connect the island and the main land, and to make them one continuous tract of land, the adjacent owners of the island and the survey are entitled to the accretions to their respective lands, but if the slough simply filled up from the bottom, or by deposits within its bed, and the accretions did not form on the one side or the other, then the center of the slough, as it was before the water left it, is the boundary between the survey and the island. *Buse v. Russell*, 209.
2. **ACCRETIONS.** Where the shore lines of two tracts of land, divided by a water course, receive accretions until they come together, the line of contact will then be the division line. *Ib.*
3. ———. If the slough gradually filled up as the water receded, the same principle is applied, and the new land belongs to the riparian owner, from whose shore the water receded, and it is immaterial whether the water was navigable in the common law sense or general acceptance of the term, or was a non-navigable stream. *Ib.*

## ADMINISTRATION.

1. **ADMINISTRATOR: SALE OF REALTY TO PAY DEBTS: LIMITATION.** There is no statute of limitations in this state prescribing the time within which an administrator must procure an order for the sale of real estate to pay the debts of the estate, and, such being the case, he must do so within a reasonable time. *Gunby v. Brown*, 253.
2. ———: ———: **REASONABLE TIME.** What is a reasonable time must be determined from all the circumstances of the case; each particular case, to a great extent, furnishing its own rules. *Ib.*

3. ——— : ———. A delay of twelve or thirteen years after the granting of letters of administration, *held*, under the circumstances of this case, to be inexcusable. *Ib.*
4. INJUNCTION. Injunction will lie to prevent a sale under an order of the probate court obtained after such unreasonable delay. *Ib.*
5. PROBATE COURT : APPEAL. An appeal lies, under Revised Statutes, section 292, from the refusal of the probate court to make a preliminary order of publication for the sale of real estate to pay debts of the estate. *Ferguson's Administrator v. Carson's Administrator*, 673.
6. ——— : SALE OF REALTY TO PAY DEBTS. When the petition for the sale of the real estate, and the accompanying lists and schedules are formal and regular, and the case thus made shows a proper cause for an order of sale, it is the duty of the court to make the order of publication. The law does not contemplate an investigation of the accounts, and an inquiry as to whether there is a deficiency of personal property, until after the proof of the order of publication, and all interested persons are thereby before the court. *Ib.*
7. ADMINISTRATION : DEBT AGAINST ESTATE : SURETY. In the defence of an action commenced in the lifetime of the deceased for a debt then in existence, his administrator gave an appeal bond, and one F became surety for the estate thereon. Subsequently, F, as such surety, paid the judgment, and took an assignment of the same and presented his demand therefor against the estate. *Held*, that when the surety paid the debt it did not lose its character of a debt against the estate, and, therefore, was not within the rule prohibiting the allowance of any claim against the estate not in existence at the time of the death of the deceased. *Ib.*

ADMINISTRATION : NOTICE OF EXHIBITION OF DEMAND : LIMITATION.  
*Wernse v. McPike*, 565.

#### ADMISSIONS.

1. EVIDENCE : ADMISSIONS OF ONE IN POSSESSION OF LAND. The admissions of one, since deceased, respecting his title to land, made while in possession of the land, are competent evidence, even as against strangers. *Anderson v. McPike*, 293.
2. ADMISSIONS IN PLEADINGS : EVIDENCE : PRESUMPTION, REBUTTAL OF. *Prima facie* the original answer of a defendant in a cause is competent evidence against him. But the testimony of the attorney, whose name is signed to the answer, that defendant did not employ him in the cause, is sufficient to overthrow the presumption arising from his name being signed as defendant's attorney, and to exclude the answer as evidence. *Ib.*

#### ADVERSE POSSESSION.

4. TITLE BY ADVERSE POSSESSION. An actual, adverse, open, and con-

tinuous possession of land under a claim and color of right from 1836 to 1860 was sufficient, not only to bar recovery by those claiming under an elder title, but conferred title upon those claiming under such adverse possession. *Farrar v. Heinrich*, 521.

2. **TRESPASS: ADVERSE POSSESSION.** When both parties claim title by possession under color of title, the origin of each being an act of trespass, the one being a trespass on the constructive possession and the other a trespass on the actual possession under the later title, the same rule of law as to the title passing by adverse possession applies to each. *Ib.*

#### AGENT.

See **PRINCIPAL AND AGENT.**

#### ALLUVION.

See **LAND AND LAND TITLES, 4.**

#### AMENDMENT.

**STREET IMPROVEMENTS: TAX-BILLS, AMENDMENT OF.** It was competent for the city engineer of the city of St. Joseph, after making out tax-bills for macadamizing, curbing and guttering two streets, on discovering that the block had been subdivided into lots, to correct and certify anew the bills, and he could so do, whether he was out of office or was holding the same as his own successor. *Morley v. Weakley*, 451.

#### APPEAL.

1. **ATTACHMENT: INTER-PLEA: APPEAL: SUPERSEDEAS: EXECUTION, WHEN OFFICER NOT LIABLE FOR FAILURE TO LEVY.** The pendency of the appeal of an interpleader from the judgment of a justice of the peace in an action of attachment, where bond is given by the interpleader, operates as a *supersedeas* in the cause, and prevents the sale of the attached property pending such appeal, and an officer is not liable in such case for failure to levy an execution issued against the property interpleaded. *The State ex rel. Boyington v. Ranson*, 327.
2. **APPEAL FROM THE ST. LOUIS COURT OF APPEALS.** Where an appeal lies to the Supreme Court from the St. Louis court of appeals, only because constitutional questions are involved, only such questions will be considered by the former court. *The Merchants' Insurance Company v. Hill*, 466.
3. **PRACTICE: JURISDICTION: APPEAL.** The circuit court does not, by granting an appeal, lose jurisdiction in a cause, and a bill of exceptions may be filed and acted upon after appeal granted. *Shaw v. Shaw*, 594.

4. PRACTICE IN SUPREME COURT : APPEAL. An appeal to the Supreme Court, which is not taken at the term final judgment is rendered, will be stricken from the docket. *The State v. Rhodes*, 635.
5. PROBATE COURT : APPEAL. An appeal lies, under Revised Statutes, section 292, from the refusal of the probate court to make a preliminary order of publication for the sale of real estate to pay debts of the estate. *Ferguson's Administrator v. Carson's Administrator*, 673.
6. JUSTICE OF PEACE : APPEAL FROM : DISMISSAL OF SUIT. Where, on an appeal from a justice of the peace, the transcript shows that the justice acquired jurisdiction of the defendant, it having filed its motion to set aside the judgment by default, a motion in the circuit court to dismiss the suit because of service of summons in the wrong township, should not be sustained. *Kelly v. The Chicago, Rock Island & Pacific Railroad Company*, 681.
7. ——— : ———. The circuit court should have proceeded under Revised Statutes, section 3052, to try the case *de novo*. *Id.*

## ARREST.

See OFFICES AND OFFICERS, 4, 5.

## ASSAULT.

1. COMMON ASSAULT : INSTRUCTION. An instruction for the state to the effect that if defendant assaulted W. by pointing a loaded gun at him in a threatening manner and cocking it within shooting distance of him, they should find defendant guilty of common assault, held erroneous. *The State v. Sears*, 169.
2. ———. An intention on the part of the accused to do the other party some bodily harm is essential to constitute an assault. *Id.*

## ASSIGNMENT.

1. ——— : DIRECTORS, ASSIGNMENT BY FOR BENEFIT OF CREDITORS. Where there is nothing in the charter or general laws of the state forbidding it, the directors of an insolvent bank have the right to make an assignment for the benefit of its creditors. *Chew v. Ellingwood*, 260.
2. VOLUNTARY ASSIGNMENT : DEED, CONSTRUCTION OF. A deed of assignment professing to be made for the benefit of all the creditors of the assignor, whether named or not, although reciting, by way of consideration, the release of some of the creditors, but containing no stipulation that those only who have or shall sign the release shall share in the benefits of the assignment, does not fall within the rule that a deed of assignment is void which contains a stipulation for the release of the debtor, as a condition of receiving any benefit from the assignment. *Jeffries v. Bleckmann*, 350.

3. ———. Under our statute (W. S., p. 150, sec. 1), declaring every voluntary assignment of property to be for the benefit of all the creditors of the assignor in the proportion of their respective claims, it is unnecessary to mention the name or the amount of debt of a creditor to entitle him to a share in its proceeds. *Ib.*
4. ———: SALE BY ASSIGNEE WITHOUT ORDER OF COURT. The sale of property by the assignee without an order of court does not render the sale fraudulent, nor does such fact affect the validity of the deed of assignment. *Ib.*
5. ———: STATUTE. Where the statute relating to voluntary assignments for the benefit of creditors determines how the trust shall be administered, it will supersede details to that end contained in the deed. *Ib.*
6. REPLEVIN: TORT, ASSIGNMENT OF. Replevin will lie for the possession of mules stolen from the owner in favor of his assignee of the right of action therefor. Following *Snyder v. Railway*, post, 613; *Doering v. Kenamore*, 588.
7. TORT TO PROPERTY: ASSIGNABILITY OF ACTION FOR: CODE. A right of action arising from a tort to property is assignable under the code (overruling *Wallen v. Railway*, 74 Mo. 521; *Snyder v. The Wabash, St. Louis & Pacific Railway Co.*, 613.

See BANKRUPTCY, 3, 4, 5.

#### ATTACHMENT.

**ATTACHMENT: INTERPLEA: APPEAL: SUPERSEDEAS: EXECUTION, WHEN OFFICER NOT LIABLE FOR FAILURE TO LEVY.** The pendency of the appeal of an interpleader from the judgment of a justice of the peace in an action of attachment, where bond is given by the interpleader, operates as a *supersedeas* in the cause, and prevents the sale of the attached property pending such appeal, and an officer is not liable in such case for failure to levy an execution issued against the property interpleaded. *The State ex rel. Boyington v. Ranson*, 327.

#### ATTORNMET.

See LANDLORD AND TENANT.

#### BANK.

1. BOND: BANK: BOOK-KEEPER, DEFALCATION OF. The fact that the book-keeper of a bank has, with the consent of its cashier, taken its money not due him and applied it to his own use, will not relieve either the book-keeper or his sureties from liability in an action on his bond which contained a provision that he would truly account for all moneys belonging to the bank, and apply its funds to their proper uses. *Chew v. Ellingwood*, 260.

2. ———: ———. The bond was given for the benefit of the stockholders and creditors of the bank, and the fact that the cashier knew of or connived at the book-keeper's defalcation can constitute no defence. *Ib.*
3. BANK DIRECTORS, NEGLIGENCE OF. Nor would the negligence of the directors, whereby they failed to discover the defalcation of the book-keeper, constitute a defence to an action on the bond. *Ib.*
4. ———: DIRECTORS. ASSIGNMENT BY FOR BENEFIT OF CREDITORS. Where there is nothing in the charter or general laws of the state forbidding it, the directors of an insolvent bank have the right to make an assignment for the benefit of its creditors. *Ib.*

## BANKRUPTCY.

1. BANKRUPTCY, DISCHARGE IN. A discharge in bankruptcy is not collaterally assailable. *Brown v. The Covenant Mutual Life Insurance Company*, 51.
2. BANKRUPT: DISCHARGE OF SURETY. C filed his voluntary petition to be adjudged a bankrupt, in May, 1878, and in November following, his wife proved up against his estate a note which he had executed to her with defendant as surety thereon, and the wife thereafter assented to the final discharge of the bankrupt. *Held*, that, as the note was executed prior to January 1, 1869, such consent of the wife was unnecessary, and was, therefore, inoperative and did not discharge the surety. *Clark v. Clark*, 114.
3. BANKRUPTCY: ASSIGNEE, POWERS OF: PRACTICE. An assignee in bankruptcy becomes entitled to the property of the bankrupt fraudulently conveyed, concealed, or inadvertently omitted, as well as that scheduled and surrendered; he acquires the title thereto by virtue of the proceedings in bankruptcy, and the deed of assignment, and is the proper party to sue for and recover the same. *Peery v. Carnes*, 652.
4. ———: ———: PRACTICE: TRUSTEE. So long as the proceedings in bankruptcy are pending, the assignee is the only proper person to sue, and the creditors are bound to assert their rights as such by and through the assignee, who is trustee for the creditors and the bankrupt, with power to collect the assets and convert the assigned property into money and distribute it among the creditors. When this is done, and the proceedings are brought to an end, his trust ceases, and whatever is left in his hands becomes the property of the bankrupt by operation of law, without any formal discharge of the assignee, or re-transfer. *Ib.*
5. ———: PRACTICE: BANKRUPT. After the assignee's trust has ceased and the bankrupt has been discharged, the latter is the proper party to sue for demands due himself, at the time he was adjudged a bankrupt. *Ib.*

BAWDY HOUSE.

See NUISANCE.

BILL OF EXCEPTIONS.

1. BILL OF EXCEPTIONS : MOTION FOR NEW TRIAL. A bill of exceptions is properly made up at the term of the court at which the motion for a new trial is overruled. And it is immaterial that such motion was overruled at the third term after it was filed without being continued from term to term by any special or general order of court. *Givens v. Van Studdiford*, 149.
2. ——— : TRANSCRIPT OF BILL OF EXCEPTIONS. The clerk of the trial court in making a transcript of the bill of exceptions cannot insert instructions not contained in nor called for by such bill. *The State v. Anderson*, 309.
3. ——— : BILL OF EXCEPTIONS: INSTRUCTIONS. The Supreme Court will not presume that proper instructions were given by the trial court for the defendant, where the bill of exceptions only discloses that instructions were given for the state, and that others were asked for by defendant and refused. *Ib.*

BILLS AND NOTES.

- 1 SETTLEMENT, IMPEACHMENT OF: NOTE. Where a settlement of accounts has taken place between parties and a note payable to a third person is given in satisfaction of the amount found to be due in an action on such note by the indorsee, the maker, without bringing all the parties interested into court, cannot impeach such settlement, nor show that the note was without consideration. *The First National Bank of Hannibal v. The North Missouri Coal and Mining Company*, 125.
2. CORPORATION, NOTE OF: ACTS OF AGENTS. The authority of a corporation or its officers to issue its promissory note need not be expressly given by its by-laws, or by formal resolution of the board of directors. Such authority can be inferred from the acquiescence of the corporation in, or the recognition by it of, the acts of its accredited officers in the regular course of its authorized business. *Ib.*

BOOK-KEEPER.

See BANK.

BOND.

1. BOND : BANK : BOOK-KEEPER, DEFALCATION OF. The fact that the book-keeper of a bank has, with the consent of its cashier, taken its money not due him and applied it to his own use will not relieve either the book-keeper or his sureties from liability in an action on

his bond which contained a provision that he would truly account for all moneys belonging to the bank, and apply its funds to their proper uses. *Chew v. Ellingwood*, 260.

2. ———: ———. The bond was given for the benefit of the stockholders and creditors of the bank, and the fact that the cashier knew of or connived at the book-keeper's defalcation can constitute no defence. *Ib.*
3. BANK DIRECTORS, NEGLIGENCE OF. Nor would the negligence of the directors, whereby they failed to discover the defalcation of the book-keeper, constitute a defence to an action on the bond. *Ib.*

See GUARDIAN AND WARD, 1.

#### BURDEN OF PROOF.

———: BURDEN OF PROOF: PRESUMPTION. If a party who has the means of information at hand makes the assertion that he relied on the statement of another, the burden is on him to establish the statement. For the law presumes that he who can see for himself, if he will but look, does look and find out for himself, and if he asserts the contrary, he cannot prevail without overcoming the presumption thus arising. *Anderson v. McPike*, 293.

#### CAPITAL STOCK.

See CORPORATIONS.

#### CERTIORARI.

See PRACTICE IN SUPREME COURT, 5.

#### CHAMPERTY.

CHAMPERTY. Unless the plaintiff's title, by which he seeks to enforce a right, is infected with a champertous agreement, he may proceed with his suit, and this is the case although such illegal contract may exist between the plaintiff and his attorney. A party will not be turned out of court because of a champertous contract, until he asks the aid of the court to enforce it. *Bent v. Priest*, 475.

#### CITATION.

See SHERIFF'S DEED, 1.

#### CITIES OF FOURTH CLASS.

1. CITIES OF FOURTH CLASS: POLICEMAN: RIGHT TO MAKE ARRESTS. A policeman in cities of the fourth class, in the absence of an ordinance giving him the authority, has no right, without a warrant,

to arrest a person for carrying concealed weapons. *The State v. Holcomb*, 371.

2. ——— : ——— : MURDER. Although the attempted arrest by the officer in such case was illegal, yet if the defendant killed the deceased with express malice, it constituted murder in the first or second degree, and not manslaughter. *Ib.*

CITY OF KANSAS.

CITY OF KANSAS : STREET RAILWAYS : ORDINANCE. Section one of the ordinance of June 29, 1880, of the City of Kansas, relating to street railways, does not require such railways, or any officer thereof, to pave the street on which their cars are operated. *The City of Kansas v. Corrigan*, 67.

CLOUD ON TITLE.

See EQUITY, 4.

COMPROMISE.

See COSTS.

CONDITIONAL SALE.

See SALE.

CONSTITUTIONAL LAW.

1. CONSTITUTION : IMPRISONMENT FOR DEBT. The provisions of the statute authorizing examination of an execution debtor, are not repugnant to the clause of the constitution inhibiting imprisonment for debt. *The State ex rel. Ames v. Barclay*, 55.
2. DEED, RECITALS IN : RETROSPECTIVE ENACTMENTS. It is competent for the legislature, by express enactment (Laws 1881, p. 171), to make the recitals in a mortgage, or deed of trust, *prima facie* evidence of the truth thereof, and it is not trenching upon private rights, nor an impairment of the obligations of contracts to apply such enactment to deeds previously executed. *Coe v. Ritter*, 277.
3. EVIDENCE, CHANGE IN RULES OF : CONSTITUTIONAL LAW : RETROSPECTIVE LEGISLATION. Rules of evidence, like other rules affecting the mere remedy, are subject to continuous modification and control by the legislature, and changes effected in these rules by legislative authority may be made applicable to existing causes of action, without trespassing upon constitutional prohibitions respecting retrospective enactments. *Ib.*
4. CONSTITUTIONAL LAW : RETROSPECTIVE LEGISLATION : IMPAIRMENT OF OBLIGATION OF CONTRACT. Section 736, Revised Statutes, 1879,

is not retrospective, and does not impair the obligation of the contract created by act of February 9, 1859. Laws, p. 74. It creates no new or additional liability or burden, and disturbs no vested rights, but creates a mere supplemental proceeding incident to a change in the remedy which it was competent for the legislature to provide. *The Merchants' Insurance Company v. Hill*, 466.

5. **DOUBLE DAMAGE ACT, CONSTITUTIONALITY OF.** The former decisions of this court holding that the double damage act (R. S., sec. 809), is not in contravention of either the state or federal constitution, sustained. *Phillips v. The Missouri Pacific Railway Company*, 540.
6. **CONSTITUTIONAL LAW: CONSTRUCTION: PRESUMPTION.** Acts of the legislature are presumed to be constitutional, and it is only where they manifestly infringe on some provision of the constitution that they can be declared void for that reason. In case of doubt, every possible presumption, not directly inconsistent with the language and subject, is to be made in favor of the constitutionality of the act. *Ib.*
7. **REVISED STATUTES, SECTION 2835, CONSTITUTIONALITY OF.** Section 2835, of the Revised Statutes, is not in violation of article four, section fifty-three, sub-division seventeen, of the constitution of Missouri, prohibiting the general assembly from passing "any local or special law regulating the jurisdiction of justices of the peace," nor is it a special act because directed against railroads alone. *Ib.*
8. **RAILROADS: DOUBLE DAMAGE ACT, CONSTITUTIONALITY OF.** The former decisions of this court, upholding the constitutionality of the double damage act, as regards both the constitution of this state and of the United States, sustained. *Hines v. The Missouri Pacific Railway Company*, 629.

#### CONSTRUCTION.

**CONSTRUCTION OF STATUTE: REVISED STATUTES, SECTION 736.** Section 736, Revised Statutes, 1879, substantially the same as General Statutes, 1865, section 11, page 328, the effect of which is that upon a *nulla bona* return to an execution against a corporation, execution may issue against any stockholder to the extent of the amount of the unpaid balance of his stock, by order of the court upon motion filed in open court after sufficient notice, is applicable to the stockholders of the Excelsior Insurance Company created by the act of February 9, 1859. Laws, p. 74. *The Merchants' Insurance Co. v. Hill*, 466.

#### CONTEMPT.

1. ——— : REFEREE: CONTEMPT. The referee appointed to conduct the examination under Revised Statutes, section 2410, has authority to commit the execution debtor for contempt where he refuses to answer proper questions. *The State ex rel. Ames v. Barclay*, 55.
2. ——— : ——— : ———. The fact that the debtor was a grand

juror at the time of the examination does not exempt him from the operation of the statute, he having appeared and submitted to such examination, and without having made any such suggestion until after he refused to answer the questions on other grounds. *Ib.*

## CONTRACTS.

1. **PERSONAL SERVICE, CONTRACT FOR.** When one enters into a contract of service for another for a fixed salary, or compensation, he, *prima facie*, agrees to give the latter his entire time, and the rendition of service by the employe, as a notary public in the employer's business, does not make the latter liable for the statutory fees therefor, in the absence of an agreement or understanding to that effect, or a course of conduct between the parties showing such fees were not to be included in the employe's salary. *Leach v. The Hannibal & St. Joseph Ry. Co.*, 27.
2. **ORDINANCE: STREET RAILWAY COMPANY: CONTRACT.** Where an ordinance of a city, which grants to a horse railway company the privilege of using its streets, requires such railway to keep portions of the street, on which it operates, in good repair, the city cannot, by a subsequent ordinance, compel the company to pave such portions of its street with specified materials, or punish any one concerned for operating the cars of the company, where the paving was not done. Such later ordinance would be an interference with the contract between the city and the railway as contained in the ordinance granting the latter its franchise. *The City of Kansas v. Corrigan*, 67.
3. **PRINCIPAL AND AGENT: SALE OF LAND: CONTRACT.** The owner of real estate situated in Kansas City, in this state, wrote from Chicago, Illinois, where he resided, to his agent, at Kansas City, in terms as follows: "Your letter received last night; I will leave the sale of the lots pretty much with you; if the party, or any one, is willing to pay sixty dollars per foot, one-third cash and balance one and two years, interest seven per cent. per annum, and pay commission of sale, I think I am willing to have you make out a deed and I will perfect it; I think you have the deeds to those lots, have you not? If you think better to try spring market, hold till then; the party buying may want the abstract in full, which I believe I have at Rockford, and will sell much less than cost. The above price is only for the present. \* \* \* It is understood that if I pay the taxes now due, that hereafter I am relieved from any taxes." *Held*, that the letter authorized the agent to make a contract for the present sale of the lots. *Smith v. Allen*, 178.
4. ———: ———. Where such agent has the power to sell, he has the authority to sign an agreement in his principal's name and to bind him thereby. *Ib.*
5. **CONTRACT: STATUTE.** The Laclede Gas Light Company had the power, under its charter, to contract with the city of St. Louis to light the city within certain defined limits, to make and vend gas and gas light, and to lay down pipes therein, and to exercise all other powers necessary to execute and carry out the privileges and powers so granted, and these powers were not withdrawn from the

company by the act of March 26, 1868 (Acts, p. —), but were, by said act, extended over the corporate limits of the city. *The St. Louis Gas Light Co. v. The City of St. Louis*, 495.

6. **CONTRACT: CONSTRUCTION OF LEASE.** Where, by the terms of a lease, the lessors agree to put in certain new machinery when needed, the necessity for the same to be decided by referees, in case the parties cannot agree, and the lessors refuse to join in selecting referees, the lessee may put in suitable machinery and charge the cost thereof to the lessors, and the latter cannot take advantage of their wrongful act in failing to join in the selection of referees. But the lessee will not be entitled to rental for the new machinery provided by him, nor to an allowance for losses incurred by him by reason of being unable to conduct his business while putting in the new machinery. *Cox v. Volkert*, 505.
7. **PAROL CONTRACT FOR SALE OF LANDS: SPECIFIC PERFORMANCE: STATUTE OF FRAUDS.** Where one seeks the specific performance of a parol contract for the sale of land, and makes out a case of part performance sufficient to take the case out of the statute of frauds, the court should find the balance due on the purchase price, if any, and on payment of the same into court vest the title in the vendee. *Webb v. Toms*, 591.

#### CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

#### CONVEYANCES.

**LIFE ESTATE, CONVEYANCE BY OWNER OF: REMAINDERMEN.** A suit to enforce a deed, made by the owner of the life estate for the fee of land, cannot be maintained against the remaindermen, although they are the heirs of the grantor and the conveyance by the latter contained covenants of general and special warranty. *Barlow v. Delaney*, 583.

See DEEDS.

#### CORPORATIONS.

1. **CORPORATION, NOTE OF: ACTS OF AGENTS.** The authority of a corporation or its officers to issue its promissory note need not be expressly given by its by-laws, or by formal resolution of the board of directors. Such authority can be inferred from the acquiescence of the corporation in, or the recognition by it of, the acts of accredited officers in the regular course of its authorized business. *The First National Bank of Hannibal v. The North Missouri Coal and Mining Company*, 125.
2. **CORPORATION: STOCKHOLDER: ABATEMENT.** A proceeding by motion under Revised Statutes, section 736, to subject a stockholder to execution on a judgment against the corporation to the extent of

the unpaid balance of his stock, does not abate on the death of the stockholder. *Marks v. Hardy*, 232.

3. MOTION AGAINST STOCKHOLDER FOR UNPAID STOCK SUBSCRIPTION: DEATH OF STOCKHOLDER. While such execution cannot issue against the estate of the deceased stockholder on the final adjudication on the motion, yet such adjudication may be regarded as a demand against the estate, and be classed as such. *Ib.*
4. ———: RETURN OF NULLA BONA. If the officer having the execution against the corporation makes a part of the debt and returns the writ *nulla bona* as to the residue, a sufficient foundation is laid to proceed, under the statute, against the stockholder for such residue. *Ib.*
5. ———: SHERIFF'S RETURN TO EXECUTION AGAINST CORPORATION. It is not necessary, in order that the stockholder may be proceeded against, that the sheriff's return to the execution against the corporation should negative the ownership of all property whatever by it. A fair and substantial *nulla bona* return is all that is required. *Ib.*
6. CORPORATION: INCREASE OF CAPITAL STOCK, NOTICE OF: STATUTE. The certified copy of the statement of proceedings relative to the increase of the capital stock of a corporation, required by Revised Statutes, section 939, to be filed in the office of the secretary of state, must show the newspaper publication of the notice of the proposed increase of stock, as required by Revised Statutes, section 938, and if such certificate fails to show such fact the secretary of state has no authority to issue his certificate that the corporation has complied with the law made and provided for the increase of stock, and the amount to which said stock is increased. *The State ex rel. The Donnell Manufacturing Company v. McGrath*, 239.
7. ———: ———. The weekly newspaper notice, required by Revised Statutes, section 938, of the proposed increase of the capital stock of a corporation, was intended for the public at large, while the written, or printed notices, required by said section to be sent to each stockholder, are for the benefit of the stockholders. *Ib.*
8. BOND: BANK: BOOK-KEEPER, DEFALCATION OF. The fact that the book-keeper of a bank has, with the consent of its cashier, taken its money not due him and applied it to his own use, will not relieve either the book-keeper or his sureties from liability in an action on his bond which contained a provision that he would truly account for all moneys belonging to the bank, and apply its funds to their proper uses. *Chew v. Ellingwood*, 260.
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11. ———: DIRECTORS, ASSIGNMENT BY FOR BENEFIT OF CREDITORS. Where there is nothing in the charter or general laws of the state forbidding it, the directors of an insolvent bank have the right to make an assignment for the benefit of its creditors. *Ib.*
12. CORPORATION: SERVICE OF PROCESS: JUDGMENT BY DEFAULT. In order to support a judgment by default against a corporation, it must appear of record that the person, who, the return of the officer shows, was served with process, has such a relation to the corporation that service on such person was tantamount to service on the corporation. *Cloud v. Inhabitants of Pierce City*, 35.
13. ST. JOSEPH BOARD OF PUBLIC SCHOOLS: BONDS: AUTHORITY TO ISSUE. The St. Joseph board of public schools had authority, by virtue of General Statutes, 1865, chapter 47, section 11, to issue, during the years 1868 and 1871, its bonds to raise money to build school houses; and, also, to issue its renewal refunding bonds, under Revised Statutes, 1879, section 7034. *The St. Joseph Board of Public Schools v. Gaylord*, 401.
14. CONSTRUCTION OF STATUTE: REVISED STATUTES, SECTION 736. Section 736, Revised Statutes, 1879, substantially the same as General Statutes, 1865, section 11, page 328, the effect of which is that upon a *nulla bona* return to an execution against a corporation, execution may issue against any stockholder to the extent of the amount of the unpaid balance of his stock, by order of the court upon motion filed in open court after sufficient notice, is applicable to the stockholders of the Excelsior Insurance Company created by the act of February 9, 1859. *Laws*, p. 74. *The Merchants' Insurance Company v. Hill*, 466.
15. DIRECTORS OF CORPORATION: AGENTS AND TRUSTEES. The directors of a corporation are trustees and agents of it and the stockholders, and, in general, are governed by the same rules as are applied to trustees and agents. *Bent v. Priest*, 475.
16. ———: ———. By accepting the office a director of a corporation undertakes to give his judgment and influence to its interests in all matters in which he represents or professes to represent it. *Ib.*
17. ———: ———. The defendant, a director in a life insurance company, in consideration of certain railroad bonds delivered to his business partner, agreed to and did advocate and vote for the assignment of the company's policies to another company and for the reinsurance of the same in the latter company. *Held*, that so many of the bonds as defendant received belonged to the corporation of which he was a director, and on his failure to produce the same a judgment for their estimated value was rightly entered. *Ib.*
18. ———: ———. There could be a recovery only for the bonds received by the defendant, and not for those retained by his business

partner, the latter not being a party to the suit and having held no fiduciary relation with defendant's corporation. *Ib.*

19. STATUTE OF LIMITATIONS. The statute of limitations commenced to run against the corporation only from the time it had knowledge of the agreement and acquisition of the bonds. *Ib.*

## COSTS.

1. COMPROMISE OF SUIT: JUDGMENT FOR COSTS. A court is not authorized to render a judgment for costs in carrying out a compromise of the parties to the suit, except in pursuance of a stipulation to that effect, entered of record, or the consent of the parties given in open court. *Murphy v. Smith*, 333.
2. ———: SEVERAL COUNTS: COSTS. In an action *ex delicto*, where the petition contains several counts, if the plaintiff recover any damages upon any count, the costs shall not be adjudged against him. R. S., sec. 995. *Vineyard v. Lynch*, 634.

## COUNSEL.

1. PRACTICE: REMARKS OF COUNSEL: NEW TRIAL. It is no ground for new trial that counsel in argument to the jury misrepresented the facts in evidence. It is for the jury in such case, to apply the correction. *The State v. Zumbunson*, 111.
2. ———: ———. Neither language of invective, by counsel, when called forth by the character of the crime, which the evidence tends to disclose, nor urgent appeals to the triers of the facts to do their duty, will justify the Supreme Court in reversing a judgment. *Ib.*
3. ———: REMARKS OF COUNSEL: DISCRETION OF TRIAL COURT. It is for the trial court to determine whether the counsel in the conduct of a case, and in argument to the jury, transcend the limits of professional duty and propriety. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railway Company*, 421.

## CRIMINAL LAW.

1. CRIMINAL LAW: LARCENY: POSSESSION. Defendant pastured cattle for one T. They escaped, and when they returned to T's there were two with them that did not belong to the latter. Defendant claimed the two as his and sold them to T. *Held*, in a prosecution against defendant for the larceny of the two, that this tended to prove that they had previously been in his possession. *The State v. Jackson*, 18.
2. ———: VENUE, PROOF OF. Venue need not be proved by direct evidence, but may be proved indirectly. *Ib.*
3. ———: LARCENY: VENUE. One who steals property in one county

and takes it into another may be indicted, tried and convicted in the latter county. Where one steals cattle in one county, and they escape from him, and he pursues them into another county, and there takes possession of them as his property, and disposes of them, as such, he is guilty of stealing the property in the latter county. R. S., sec. 1691. *Ib.*

4. ——— : FORGERY IN SECOND DEGREE : INDICTMENT. An indictment for forgery in the second degree under Revised Statutes, section 1406, examined and approved. *The State v. Yerger*, 33.
5. ——— : ——— : ———. In an indictment for forgery, it is not necessary to expressly allege that the name charged to have been forged was affixed to the forged instrument, when the latter is set forth according to its tenor and shows such to be the fact. *Ib.*
6. ——— : FORGERY : TENOR : PURPORT. Where the tenor of the forged instrument is exact, and complete, and sufficiently gives the purport, the purporting clause may be rejected as surplusage. *Ib.*
7. FORGERY : INDICTMENT : INTENT. It is not necessary to the validity of an indictment for forgery that it should charge an intent on the part of the defendant to defraud any particular person. *Ib.*
8. PRACTICE, CRIMINAL : PRESENCE OF DEFENDANT IN COURT DURING TRIAL. When the record in the appellate court shows that the defendant in a criminal cause was present at the commencement, or any other stage of the trial, it will be presumed, in the absence of evidence in the record to the contrary, that he was present during the whole trial. R. S., sec. 1891. *Ib.*
9. CRIMINAL LAW : FORGERY : EVIDENCE. An alleged forged instrument is properly admitted in evidence, where it is correctly described in the indictment, or set forth according to its tenor. *Ib.*
10. ——— : ——— : INDICTMENT. It is not necessary in an indictment for forging a check, to set out the indorsement thereon, as that is not charged to be forged, and has nothing to do with the forged instrument. *Ib.*
11. ——— : ——— : EVIDENCE : VENUE. The possession of a forged instrument, or the uttering of it by one in the county where the indictment is found, is strong evidence to show that the forgery of the instrument was committed by him in the same county. *Ib.*
12. MISDEMEANOR : OFFENCE, WHAT NECESSARY TO CONSTITUTE. There can be no offence or misdemeanor, except as the result of the violation of some duty plainly imposed by a competent law-making power. *The City of Kansas v. Corrigan*, 67.
13. CRIMINAL LAW : LARCENY : EVIDENCE. Defendant and his confederates inveigled the owner of horses into a sale stable, in St. Louis, where another confederate acted in the role of a buyer, and still another as a friend of all parties, in consummating a trade, and

while his confederates were endeavoring to trick the owner of the horses into believing that he had traded them for certain mules, which the owner refused to do, the defendant took the horses and went off with them against the will and remonstrance of the owner. *Held*, that defendant was properly convicted of grand larceny. *The State v. Zumbunson*, 111.

14. **INDICTMENT : FELONIOUS ASSAULT.** An indictment, under Revised Statutes, section 1263, charging that defendant assaulted another by pointing a gun at the latter with the intent to maim and kill him, is not defective in only alleging that the gun was loaded with gunpowder. Serious injury can be inflicted with a gun so loaded. *The State v. Sears*, 169.
15. **CRIMINAL LAW : FELONIOUS ASSAULT : INSTRUCTIONS.** The evidence was to the effect that defendant pointed a loaded rifle at one W, and threatened to shoot him if he did not leave a certain field of which he was in possession, and in which he was at work, and that defendant and W were then from thirty to fifty feet apart. There was no evidence as to whether one, with a gun so loaded, and at the distance stated from another, could have killed or maimed the latter. *Held*, that the court rightly refused 'to instruct the jury, for the defendant, that if they should believe from the evidence that, on account of the distance between the parties at the time, a discharge of the rifle by defendant, loaded as charged, could not have killed or maimed W, they should acquit. *Ib.*
16. **COMMON ASSAULT : INSTRUCTION.** An instruction for the state to the effect that if defendant assaulted W, by pointing a loaded gun at him in a threatening manner, and cocking it within shooting distance of him, they should find defendant guilty of common assault, *held*, erroneous. *Ib.*
17. ———. An intention on the part of the accused to do the other party some bodily harm, is essential to constitute an assault. *Ib.*
18. **CRIMINAL PRACTICE : ASSESSMENT OF PUNISHMENT.** Where the jury assess the punishment below the legal limit allowed by law for the offence of which they find the defendant guilty, it is the duty of the court to sentence the defendant according to the lowest limit prescribed by law in such case. *Ib.*
19. **INDICTMENT : PROSECUTOR.** Where an indictment is for a felony, the name of the prosecutor is not required to be endorsed thereon, although under the indictment the defendant may be convicted of an offence which is only a misdemeanor. *Ib.*
20. **CRIMINAL LAW.** One may bring on a difficulty and follow it up in a manner which will not justify the other party in killing him. *The State v. Anderson*, 309.
21. **CRIMINAL PRACTICE : DEFENDANT TESTIFYING.** A defendant who has testified is entitled to have instructions predicated on the facts sworn to by him just as if he were a disinterested witness. *Ib.*

22. THE EVIDENCE in this case held not to authorize an instruction for any degree of manslaughter. *Ib.*
23. CRIMINAL LAW: EVIDENCE. On the trial of one for murder, it is not competent for him to show by his statement, made at the time he purchased the pistol with which he killed the deceased, that his purpose in buying it was to kill mad dogs. *The State v. Holcomb*, 371.
24. ———: MURDER: PRACTICE: INSTRUCTIONS. On a trial for murder, the court should not instruct for a grade of homicide not shown by the evidence. *The State v. Wilson*, 520.
25. ———: PLEADING: PRACTICE: EVIDENCE. An indictment for felonious assault, under Revised Statutes, section 1262, and a series of instructions applicable to that offence approved, and the evidence in the case held sufficient to sustain a conviction. *The State v. Jones*, 623.
26. ———: PRACTICE: INSTRUCTIONS. In a prosecution for felonious assault, under Revised Statutes, section 1262, where the evidence shows that grade of offence, it is not error to refuse to instruct that the defendant may be awarded a less degree of punishment than imprisonment in the penitentiary. *Ib.*

See PLEADING, CRIMINAL.

PRACTICE, CRIMINAL.

DAMAGES.

1. EJECTMENT: DAMAGES: STATUTE. The statute with respect to ejectment suits contemplates that damages may be declared for in the same suit and in the same count. *Roberts v. Nelson*, 21.
2. MALICIOUS PROSECUTION: DAMAGES. In an action for malicious prosecution, founded on a prosecution without probable cause of two of five counts of an information, the plaintiff, in order to recover actual damages, is not required to distinguish by his evidence the damages arising from the prosecution of the two counts sued on from those incident to the other counts. The defendant cannot, by uniting in the information groundless accusations with those for which probable cause might exist, escape liability because of the plaintiff's inability to adjust the damages between the two. *Boogher v. Bryant*, 42.
3. LEASING PROPERTY FOR BAWDY HOUSE: INJURY TO ADJOINING OWNER. To render the landlord responsible in such case to the adjoining owner for the depreciation in value of the latter's property resulting from such alleged nuisance, it must appear that he leased the property for the purpose of or knowing it would be used for a bawdy house and that he assented to the indecent conduct of the inmates, or continued the leasing after knowledge of the fact. *Givens v. Van Studdiford*, 149.

4. PUBLIC NUISANCE, PRIVATE ACTION FOR. While, as a general rule, it is true that the law does not give a private action for a public wrong, an exception to this exists where a private person suffers some damage over and beyond the rest of the community by reason of a public nuisance. *Ib.*
5. ——— : SPECIAL DAMAGE. In a private action for injury resulting from a public nuisance, the special damage suffered by the plaintiff must be averred and proved. *Ib.*
6. MEASURE OF DAMAGES. The loss of rents is a proper element of damages in an action against the lessor of a bawdy house by the owner of adjoining property for injury resulting to the latter from the nuisance. *Ib.*
7. ———. The depreciation in the value of the property, it having been sold at a forced sale during the continuance of the nuisance, is also a proper element of damages. *Ib.*
8. ——— : ——— : DAMAGES. The right of the servant to recover damages for injuries incurred in the use of defective machinery, depends upon proof that the injuries were so incurred, and that the master was aware of the defect, or that the use of reasonable care on his part would have disclosed the defect. *Covey v. The Hannibal & St. Joseph Railway Company*, 635.

See EJECTMENT, 2.

DEEDS.

1. SHERIFF'S DEED : JUDGMENT : NOTICE : CITATION. A sheriff's deed, based upon certain judgments of the county court for principal and interest due upon township school bonds, under Revised Statutes, 1855, where such judgments recite a notice, but not a citation, as provided for by Revised Statutes, 1855, page 1425, section 29, is void. *Roberts v. Nelson*, 21.
2. ——— : ——— : SALE. Such deed is void where the sale under the judgment is made at the sitting of the county court, instead of during a term of the circuit court. *Ib.*
3. ——— : ——— : ——— : DOWER. Where a sheriff's deed is based upon a judgment against the husband and a sale thereunder before his death, it will not deprive the widow of her dower, and until dower is assigned to her she will be entitled to the possession of the property. *Ib.*
4. STATUTE OF LIMITATIONS : DISABILITY OF MINORITY : DISAFFIRMANCE OF DEED BY HEIRS. Where a married woman, who is a minor, with the concurrence of her husband, conveys land which descended to her from her ancestor, and dies before attaining her majority, leaving as her sole heir the plaintiff, also a minor, the latter is vested with the right to disaffirm such conveyance, and has the statutory period of three years after attaining her majority

within which to do so, and the institution of an action within such time for the recovery of said land is a valid disaffirmance of the conveyance. *Harris v. Ross*, 89.

5. ———: ———: ———. The conveyance of the grantor and her husband was effectual to pass the title during their joint lives, or during his life, if a tenant by curtesy, and the wife not having survived the particular estate, no cause of action ever accrued to her, and the statute of limitations never commenced to run in her favor; the heir, therefore, was the first person entitled to sue, and against whom the statute first began to run, and, being an infant, she had the full statutory period within which to disaffirm the deed and commence her action. *Ib.*
6. TAX DEED: STATUTE. Where the statute prescribes a form for a tax deed, such form becomes a matter of substance and must be strictly followed. *Hopkins v. Scott*, 140.
7. ———: ———. Where the statute provides that the tax deed shall be substantially in the form prescribed such form must be substantially, although not literally, complied with. *Ib.*
8. ———: OMISSION OF RECITALS PRESCRIBED BY STATUTE. While it is not necessary, in the latter case, to make the recitals in the words employed in the prescribed form, yet it is necessary that the recitals required in such form be substantially made, and if not so made, such omission is fatal to the deed. *Ib.*
9. ———: ———. The omission in a tax deed of the words, "for the payment of taxes, interest and costs then due and unpaid on said real property," is fatal to such deed, the statute having prescribed a form containing such recital and requiring that the deed should substantially comply with the form. *Ib.*
10. STATUTE OF LIMITATIONS: VOID TAX DEED. A tax deed omitting such recital is void on its face, and the special three years statute of limitations does not run in favor of the person holding possession under such deed. *Ib.*
11. DEED, DESCRIPTION IN. The description in a deed was as follows: "Beginning on south side of Broadway, 520 feet west of the east line of the northwest quarter of the southeast quarter of section three, township forty-five, range twenty-one, in Pettis county, Mo., thence south 165 feet, thence east 120 feet, thence north 165 feet, thence west 165 feet, to the place of beginning." Held, that it was sufficient. *Coe v. Ritter*, 277.
12. ———: EVIDENCE. Where no uncertainty in description appears upon the face of a deed, but is shown by extrinsic evidence, it is then competent, by other extrinsic evidence, to apply the description in the deed to the land intended to be described. *Ib.*
13. DEED, RECITALS IN: RETROSPECTIVE ENACTMENTS. It is competent for the legislature, by express enactment (Laws 1881, p. 171), to make the recitals in a mortgage, or deed of trust, *prima facie* evi-

dence of the truth thereof, and it is not trenching upon private rights, nor an impairment of the obligations of contracts to apply such enactment to deeds previously executed. *Ib.*

14. VOLUNTARY ASSIGNMENT: DEED: CONSTRUCTION OF. A deed of assignment, professing to be made for the benefit of all the creditors of the assignor, whether named or not, although reciting, by way of consideration, the release of some of the creditors, but containing no stipulation that those only who have or shall sign the release shall share in the benefits of the assignment, does not fall within the rule that a deed of assignment is void which contains a stipulation for the release of the debtor, as a condition of receiving any benefit from the assignment, *Jeffries v. Bleckmann*, 350.
15. NOTICE: DEED. One who claims title through a deed which recites that the land is subject to an incumbrance, will be held to have been put on inquiry as to the nature and amount of such incumbrance when he purchased. *Bronson v. Wanzer*, 408.
16. LIFE ESTATE, CONVEYANCE BY OWNER OF: REMAINDERMEN. A suit to enforce a deed, by the owner of the life estate of the fee of land, cannot be maintained against the remaindermen, although they are the heirs of the grantor, and the conveyance by the latter contained covenants of general and special warranty. *Barlow v. Delaney*, 583.

DEED, CONSTRUCTION OF: HABENDUM: LIFE ESTATE: REMAINDER.  
*Bean v. Kenmuir*, 666.

#### DEFAULT.

See JUDGMENTS, 11.

#### DESCRIPTION.

See DEEDS, 11.

#### DIRECTORS.

1. DIRECTORS OF CORPORATION: AGENTS AND TRUSTEES. The directors of a corporation are trustees and agents of it and the stockholders, and, in general, are governed by the same rules as are applied to trustees and agents. *Bent v. Priest*, 475.
2. — : —. By accepting the office, a director of a corporation undertakes to give his judgment and influence to its interests in all matters in which he represents or professes to represent it. *Ib.*
3. — : —. The defendant, a director in a life insurance company, in consideration of certain railroad bonds delivered to his business partner, agreed to and did advocate and vote for the assignment of the company's policies to another company and for the re insurance of the same in the latter company. *Held*, that so

many of the bonds as defendant received belonged to the corporation of which he was a director, and on his failure to produce the same a judgment for their estimated value was rightly entered. *Ib.*

4. ——— : ———. There could be a recovery only for the bonds received by the defendant, and not for those retained by his business partner, the latter not being a party to the suit and having held no fiduciary relation with defendant's corporation. *Ib.*

#### DOWER.

1. WIDOW'S RIGHT TO MANSION HOUSE : DOWER : EJECTMENT : RENTS AND PROFITS. The widow has the right to remain and enjoy the mansion house of her deceased husband, and the messuages and plantation thereto belonging, until dower is assigned to her; this right can only be terminated by the assignment of dower, and ejectment will lie to enforce her right of possession to such lands, and she is entitled to the whole of the rents where there is no outstanding lease at the date of her husband's death. *Roberts v. Nelson*, 21.
2. DEATH OF WIDOW PENDING SUIT : REVIVAL IN NAME OF ADMINISTRATOR : EJECTMENT : DAMAGES. Where the widow dies, pending an action of ejectment by her for the recovery of possession of the mansion house and messuages, the suit may be revived in the name of her administrator and recovery had for rents and profits, by way of damages, to the time of her death. *Ib.*
3. ——— : ——— : ——— : DOWER. Where a sheriff's deed is based upon a judgment against the husband and a sale thereunder before his death, it will not deprive the widow of her dower, and until dower is assigned to her she will be entitled to the possession of the property. *Ib.*

#### EJECTMENT.

1. WIDOW'S RIGHT TO MANSION HOUSE : DOWER : EJECTMENT : RENTS AND PROFITS. The widow has the right to remain and enjoy the mansion house of her deceased husband, and the messuages and plantation thereto belonging, until dower is assigned to her; this right can only be terminated by the assignment of dower, and ejectment will lie to enforce her right of possession to such lands, and she is entitled to the whole of the rents where there is no outstanding lease at the date of her husband's death. *Roberts v. Nelson*, 21.
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3. EJECTMENT, DAMAGES : STATUTE. The statute with respect to eject-

ment suits contemplates that damages may be declared for in the same suit, and in the same count. *Ib.*

4. ———. Where a plaintiff comes into possession of the premises after the commencement of his action of ejectment, and during its pendency, he is, nevertheless, entitled to a judgment for mesne profits, and for his costs. *Crispen v. Hannovan*, 160.
5. VERDICT. A verdict for plaintiff in ejectment is sufficiently definite in its description of the premises, if the boundary lines as fixed by the verdict can be traced thereon. *Buse v. Russell*, 209.
6. EJECTMENT : TITLE. The elder title, when the better one, must prevail in an action of ejectment. *Farrar v. Heinrich*, 321.

EJECTMENT : RECOVERY FOR IMPROVEMENTS. *The Hannibal & St. Joseph Railway Company v. Shortridge*, 662.

See HOMESTEADS AND EXEMPTIONS, 11.

#### ELECTION.

See HOMESTEADS AND EXEMPTIONS, 4, 5.

#### EQUITY.

1. MORTGAGE : AFTER-ACQUIRED PROPERTY : LEGAL TITLE : EQUITY. A mortgagee of chattels not *in esse*, or not owned by the mortgageor at the execution of the mortgage, will not pass the legal title to such after-acquired property, and the mortgagee, to render his lien effectual, must assert it in a court of equity. *France v. Thomas*, 80.
2. EQUITY : PURCHASER WITH NOTICE UNDER PURCHASER WITHOUT NOTICE. A purchaser with notice, from a *bona fide* purchaser for a valuable consideration without notice, is entitled to the same protection in equity against one seeking to overturn his title as the purchaser without notice. *Anderson v. McPike*, 293.
3. ——— : FRAUD IN OBTAINING JUDGMENT. Where a judgment is fraudulently obtained against one, in violation of a compromise agreement, any title acquired thereunder by the plaintiff in the suit, or by any one having notice of the injustice practiced in obtaining the judgment, is voidable in equity as against the defendant in such suit, or those claiming under him. *Murphy v. Smith*, 333.
4. FRAUDULENT JUDGMENT, SALE UNDER : REMOVAL OF CLOUD ON TITLE. The evidence in this case reviewed and held, reversing the finding of the trial court, that a purchaser at a sheriff's sale and his vendee bought with notice of the fraud practiced in obtaining the judgment, and the title asserted thereunder removed as a cloud on defendant's title by divesting it out of plaintiff and vesting it in defendant. *Ib.*

5. ——— : ——— : WHEN PURCHASE MONEY NOT RESTORED. Said relief granted in this case without requiring the defendant in this action to restore the purchase money paid at the sale, for the reasons that it was not paid in discharge of any lawful lien upon the land, and the defendant did not have the benefit of any part of it. *Ib.*
6. EQUITABLE ACTION : PRACTICE : JURY. A suit to subject land to the enforcement of a vendor's lien being an equitable one is properly triable by the court, and a jury cannot be demanded therein as a matter of right. *Bronson v. Wanzer*, 408.
7. ——— : ——— : ———. The court, however, in such suit, may, in its discretion, take the opinion of the jury upon a specific question of fact by an issue made up for the purpose, but it is not bound by the finding of the jury and may adopt or reject the same as it may deem proper. *Ib.*
8. JURISDICTION : EQUITY : POWER TO SET ASIDE JUDGMENT. The circuit court, being a court of original chancery powers in this state, has jurisdiction to enjoin the issuance of execution upon a judgment procured by fraud in the court of common pleas, notwithstanding such judgment has been affirmed by the Supreme Court. *The State ex rel. Phelan v. Engelmann*, 551.

## EVIDENCE.

1. CRIMINAL LAW : LARCENY : POSSESSION. Defendant pastured cattle for one T. They escaped, and when they returned to T's there were two with them that did not belong to the latter. Defendant claimed the two as his and sold them to T. *Held*, in a prosecution against defendant for the larceny of the two, that this tended to prove that they had previously been in his possession. *The State v. Jackson*, 18.
2. EVIDENCE. Receipts given by the employe to the employer, stating that the sums therein mentioned were in full for all demands for work done during regular and irregular hours, in the employer's service, are admissible in evidence in an action for such fees, and are *prima facie* evidence of payment as therein expressed, and such receipts are also competent evidence to show the capacity in which the employe acted, and the relation he sustained to the employer. *Leach v. The Hannibal & St. Joseph Railroad Company*, 27.
3. CRIMINAL LAW : FORGERY : EVIDENCE. An alleged forged instrument is properly admitted in evidence, where it is correctly described in the indictment, or set forth according to its tenor. *The State v. Yerger*, 33.
4. ——— : ——— : ——— : VENUE. The possession of a forged instrument, or the uttering of it by one in the county where the indictment is found, is strong evidence to show that the forgery of the instrument was committed by him in the same county. *Ib.*
5. ——— : LARCENY : EVIDENCE. Defendant and his confederates

inveigled the owner of horses into a sale stable, in St. Louis, where another confederate acted in the role of a buyer, and still another as a friend of all parties, in consummating a trade, and while his confederates were endeavoring to trick the owner of the horses into believing that he had traded them for certain mules, which the owner refused to do, the defendant took the horses and went off with them against the will and remonstrance of the owner. *Held*, that defendant was properly convicted of grand larceny. *The State v. Zumbunson*, 111.

6. DEED, DESCRIPTION IN: EVIDENCE. Where no uncertainty in description appears upon the face of a deed, but is shown by extrinsic evidence, it is then competent, by other extrinsic evidence, to apply the description in the deed to the land intended to be described. *Coe v. Ritter*, 271.
7. DEED, RECITALS IN: RETROSPECTIVE ENACTMENTS. It is competent for the legislature, by express enactment (Laws 1881, p. 171), to make the recitals in a mortgage or deed of trust, *prima facie* evidence of the truth thereof, and it is not trenching upon private rights, nor an impairment of the obligations of contracts, to apply such enactment to deeds previously executed. *Ib.*
8. EVIDENCE, CHANGE IN RULES OF: CONSTITUTIONAL LAW: RETROSPECTIVE LEGISLATION. Rules of evidence, like other rules affecting the mere remedy, are subject to continuous modification and control by the legislature, and changes effected in these rules by legislative authority, may be made applicable to existing causes of action, without trespassing upon constitutional prohibitions respecting retrospective enactments. *Ib.*
9. MECHANIC'S LIEN: ACCOUNT OF DEMAND: EVIDENCE. In a proceeding to enforce a mechanic's lien, the lienor must stand or fall by the account which he files, and the dates and items which he specifies, and cannot defeat or postpone a prior lienor or incumbrancer by matter *in pais*. *Ib.*
10. FRAUDULENT REPRESENTATIONS: EVIDENCE. In an action for damages for fraudulent representations touching the financial condition of a third person, evidence of such representations to plaintiffs by defendant are admissible in evidence, if they were the means of inducing the plaintiffs to part with their property, as in that case there would be a fraud coupled with an injury. *Anderson v. Mcpike*, 293.
11. EVIDENCE: ADMISSIONS OF ONE IN POSSESSIONS OF LAND. The admissions of one, since deceased, respecting his title to land, made while in possession of the land, are competent evidence, even as against strangers. *Ib.*
12. ADMISSIONS IN PLEADINGS: EVIDENCE: PRESUMPTION, REBUTTAL OF. *Prima facie* the original answer of a defendant in a cause is competent evidence against him. But the testimony of the attorney, whose name is signed to the answer, that defendant did not employ him in the cause, is sufficient to overthrow the presumption arising

from his name being signed as defendant's attorney and to exclude the answer as evidence. *Ib.*

13. FALSE REPRESENTATIONS: EVIDENCE. In an action for damages for fraudulent representations in the sale of land between a purchaser under a deed of trust and his grantors, a deed from the grantor in the deed of trust to a third person, made after the purchase at the sale under the trust deed, and the subsequent sale by such purchaser, is irrelevant and inadmissible in evidence. *Ib.*
14. POLICEMAN: PROOF OF OFFICIAL CHARACTER. It is only necessary, in order to show that one was a policeman in a city of the fourth class, to prove that he acted and was recognized as such officer. It is unnecessary to produce his official appointment as policeman. *The State v. Holcomb*, 371.
15. CRIMINAL LAW: EVIDENCE. On the trial of one for murder, it is not competent for him to show by his statement, made at the time he purchased the pistol with which he killed the deceased, that his purpose in buying it was to kill mad dogs. *Ib.*
16. PRACTICE: EVIDENCE: OPINION OF WITNESS. It is not reversible error for a non-expert witness, who testifies to the facts in a case, to give an opinion based upon such facts. *Straus v. The Kansas City, St. J. & C. B. Ry. Co.*, 421.
17. ———: STREET IMPROVEMENT: LOST BID: EVIDENCE. Where a bid for macadamizing, etc., a street is lost, the loss being shown, parol evidence of its contents is admissible and the fact that no record or an imperfect account of the bid was kept, will not prevent plaintiff from showing its true contents. *Morley v. Weakley*, 451.
18. EVIDENCE. In an action by the gas company to recover from the city the contract price for gas supplied to the public lamps, and for services rendered in lighting lamps, the record kept by the city engineer, and the register kept by the gas inspector, are competent evidence. *The St. Louis Gas Light Company v. The City of St. Louis*, 495.
19. RESULTING TRUSTS: STATUTE OF FRAUDS: EVIDENCE. Resulting trusts are not within the statute of frauds, and parol evidence may be resorted to, to establish them, but to have that effect, such evidence must be almost conclusive in its character. *Shaw v. Shaw*, 594.
20. EVIDENCE: HUSBAND, COMPETENCY AS WITNESS. A husband, who is a co-plaintiff with his wife in an action under Revised Statutes, section 2121, for the death of their son, is a competent witness on the trial of the cause. *Bell v. The Hannibal & St. Joseph Railway Company*, 599.

See PERSONAL SERVICE, 4.

## EXCELSIOR INSURANCE COMPANY.

CONSTRUCTION OF STATUTE: REVISED STATUTES, SECTION 736. Section 736, Revised Statutes, 1879, substantially the same as General Statutes, 1865, section 11, page 328, the effect of which is that upon a *nulla bona* return to an execution against a corporation, execution may issue against any stockholder to the extent of the amount of the unpaid balance of his stock, by order of the court upon motion filed in open court after sufficient notice, is applicable to the stockholders of the Excelsior Insurance Company created by the act of February 9, 1859. Laws, p. 74. *The Merchants' Insurance Company v. Hill*, 466.

## EXECUTION.

1. EXECUTION DEBTOR: EXAMINATION OF TO DISCOVER PROPERTY: STATUTE. In an examination of an execution debtor, under Revised Statutes, section 2410, *et seq.*, to discover his assets, he can be required to disclose, not only that he has property, but where and in whose possession it is, and the terms upon which it is held. *The State ex rel. Ames v. Barclay*, 55.
2. ———: ———. The debtor cannot discontinue such examination by disclosing only so much property as he deems sufficient to satisfy the judgment. *Ib.*
3. ———: ———: IMPRISONMENT FOR DEBT. The provisions of the statute authorizing such examination of an execution debtor are not repugnant to the clause of the constitution inhibiting imprisonment for debt. *Ib.*
4. ———: REFEREE: CONTEMPT. The referee appointed to conduct the examination has authority to commit the execution debtor for contempt where he refuses to answer proper questions. *Ib.*
5. ———: ———: ———. The fact that the debtor was a grand juror at the time of the examination does not exempt him from the operation of the statute, he having appeared and submitted to such examination, and without having made any such suggestion, until after he refused to answer the questions on other grounds. *Ib.*
6. CORPORATION: STOCKHOLDER: ABATEMENT. A proceeding by motion under Revised Statutes, section 736, to subject a stockholder to execution on a judgment against the corporation to the extent of the unpaid balance of his stock, does not abate on the death of the stockholder. *Marks v. Hardy*, 232.
7. MOTION AGAINST STOCKHOLDER FOR UNPAID STOCK SUBSCRIPTION: DEATH OF STOCKHOLDER. While such execution cannot issue against the estate of the deceased stockholder on the final adjudication on the motion, yet such adjudication may be regarded as a demand against the estate, and be classed as such. *Ib.*
8. ———: RETURN OF NULLA BONA. If the officer having the execu-

tion against the corporation makes a part of the debt and returns the writ *nulla bona* as to the residue, a sufficient foundation is laid to proceed, under the statute, against the stockholder for such residue. *Ib.*

9. ———: SHERIFF'S RETURN TO EXECUTION AGAINST CORPORATION. It is not necessary, in order that the stockholder may be proceeded against, that the sheriff's return to the execution against the corporation should negative the ownership of all property whatever by it. A fair and substantial *nulla bona* return is all that is required. *Ib.*
10. EXECUTION, RETURN OF: PRESUMPTION. A return of a sheriff to an execution will be presumed to have been deposited with the clerk of the court on the return day, in the absence of anything to the contrary in such return or on the writ. *Ib.*
11. ———: ———. When the law fixes a day for the return of an execution, such return should not be made before that day. *Ib.*
12. ———: ———: PRIORITY. The creditor of a corporation can gain no priority by filing his motion for execution against a stockholder before the return day of the execution against the corporation. *Ib.*

See OFFICES AND OFFICERS.

#### EXECUTION DEBTOR.

See EXECUTION.

#### FELONIOUS ASSAULT.

1. INDICTMENT: FELONIOUS ASSAULT. An indictment under Revised Statutes, section 1263, charging that defendant assaulted another by pointing a gun at the latter with the intent to maim and kill him is not defective in only alleging that the gun was loaded with gunpowder. Serious injury can be inflicted with a gun so loaded. *The State v. Sears*, 169.
2. CRIMINAL LAW: FELONIOUS ASSAULT: INSTRUCTIONS. The evidence was to the effect that defendant pointed a loaded rifle at one W., and threatened to shoot him if he did not leave a certain field, of which he was in possession, and in which he was at work, and, that defendant and W. were then from thirty to fifty feet apart. There was no evidence as to whether one, with a gun so loaded and at the distance stated from another, could have killed or maimed the latter. *Held*, that the court rightly refused to instruct the jury for the defendant, that, if they should believe from the evidence that on account of the distance between the parties at the time, a discharge of the rifle by defendant, loaded as charged, could not have killed or maimed W., they should acquit. *Ib.*

See CRIMINAL LAW, 25, 26.

## FORGERY.

1. CRIMINAL LAW: FORGERY IN SECOND DEGREE: INDICTMENT. An indictment for forgery in the second degree under Revised Statutes, section 1406, examined and approved. *The State v. Yerger*, 33.
2. ———: ———: ———. In an indictment for forgery, it is not necessary to expressly allege that the name charged to have been forged was affixed to the forged instrument when the latter is set forth according to its tenor and shows such to be the fact. *Ib.*
3. ———: FORGERY: TENOR: PURPORT. Where the tenor of the forged instrument is exact, and complete, and sufficiently gives the purport, the purporting clause may be rejected as surplusage. *Ib.*
4. FORGERY: INDICTMENT: INTENT. It is not necessary to the validity of an indictment for forgery that it should charge an intent on the part of the defendant to defraud any particular person. *Ib.*
5. CRIMINAL LAW: FORGERY: EVIDENCE. An alleged forged instrument is properly admitted in evidence where it is correctly described in the indictment, or set forth according to its tenor. *Ib.*
6. ———: ———: INDICTMENT. It is not necessary in an indictment for forging a check, to set out the indorsement thereon, as that is not charged to be forged and has nothing to do with the forged instrument. *Ib.*
7. ———: ———: EVIDENCE: VENUE. The possession of a forged instrument, or the uttering of it by one in the county where the indictment is found, is strong evidence to show that the forgery of the instrument was committed by him in the same county. *Ib.*

## FRAUD.

1. EQUITY: FRAUD IN OBTAINING JUDGMENT. Where a judgment is fraudulently obtained against one, in violation of a compromise agreement, any title acquired thereunder by the plaintiff in the suit, or by any one having notice of the injustice practiced in obtaining the judgment, is voidable in equity as against the defendant in such suit, or those claiming under him. *Murphy v. Smith*, 333.
2. COMPROMISE OF SUIT: JUDGMENT FOR COSTS. A court is not authorized to render a judgment for costs in carrying out a compromise of the parties to the suit, except in pursuance of a stipulation to that effect entered of record, or the consent of parties given in open court. *Ib.*
3. FRAUDULENT JUDGMENT, SALE UNDER: REMOVAL OF CLOUD ON TITLE. The evidence in this case reviewed and held, reversing the finding of the trial court, that a purchaser at a sheriff's sale and his vendee bought with notice of the fraud practiced in obtaining the judg-

ment and the title asserted thereunder, removed as a cloud on defendant's title by divesting it out of plaintiff and vesting it in defendant. *Ib.*

4. **PAROL CONTRACT FOR SALE OF LANDS : SPECIFIC PERFORMANCE : STATUTE OF FRAUDS.** Where one seeks specific performance of a parol contract for the sale of land, and makes out a case of part performance sufficient to take the case out of the statute of frauds, the court should find the balance due on the purchase price, if any, and on payment of the same into court, vest the title in the vendee. *Webb v. Toms*, 591.
5. **RESULTING TRUSTS : STATUTE OF FRAUDS : EVIDENCE.** Resulting trusts are not within the statute of frauds, and parol evidence may be resorted to to establish them, but to have that effect such evidence must be almost conclusive in its character. *Shaw v. Shaw*, 594.

#### FRAUDULENT REPRESENTATIONS.

1. **FRAUDULENT REPRESENTATIONS : EVIDENCE.** In an action for damages for fraudulent representations touching the financial condition of a third person, evidence of such representations to plaintiffs by defendant are admissible in evidence, if they were the means of inducing the plaintiffs to part with their property, as in that case there would be a fraud coupled with an injury. *Anderson v. McPike*, 293.
2. ——— : **PRACTICE : INSTRUCTIONS.** In the trial of an action for damages for fraudulent representations touching the financial condition of a person, the jury should not be left to conjecture as to what are *material* false statements. *Ib.*
3. **FRAUDULENT REPRESENTATIONS, RELIANCE UPON.** Where a party to whom fraudulent representations are made does not rely upon them, but seeks information from other quarters to verify the statements made, he cannot afterwards claim that a deceit has been practiced upon him by the party originally making the representations. *Ib.*
4. ——— : **BURDEN OF PROOF : PRESUMPTION.** If a party who has the means information at hand makes the assertion that he relied on the statement of another, the burden is on him to establish the statement. For the law presumes that he who can see for himself, if he will but look, does look and find out for himself, and if he asserts the contrary, he cannot prevail without overcoming the presumption thus arising. *Ib.*
5. **FRAUDULENT REPRESENTATION : KNOWLEDGE OF PERSON MAKING : PRESUMPTION.** Fraud is not established and relief will not, in general, be granted without proof that the party who made the false representation knew at the time it was false. The law raises no presumption of knowledge from the mere fact that the representation is false. *Ib.*

6. FALSE ASSERTION OF VALUE: WARRANTY: OPINION. A mere false assertion of value, where no warranty is intended, is no ground of relief to a purchaser, because such assertion is a mere matter of opinion, which does not imply knowledge and is a thing about which men may differ. Mere expression of judgment or opinion does not amount to warranty. *Ib.*
7. FALSE REPRESENTATIONS: EVIDENCE. In an action for damages for fraudulent representations in the sale of land between a purchaser under a deed of trust and his grantors, a deed from the grantor in the deed of trust to a third person, made after the purchase at the sale under the trust deed, and the subsequent sale by such purchaser, is irrelevant and inadmissible in evidence. *Ib.*

FALSE REPRESENTATIONS.

See FRAUDULENT REPRESENTATIONS

GENERAL ASSEMBLY.

GENERAL ASSEMBLY. One general assembly cannot prescribe the manner or the language by which a subsequent general assembly shall amend, alter or repeal a law passed by the former. *The St. Joseph Board of Public Schools v. Gaylord*, 401.

GIFT.

1. PERSONAL PROPERTY: GIFT. Delivery of possession, either actual or constructive, is essential to a gift of corporeal personal property. *Doering v. Kenamore*, 538.
2. ———: ———. Where such property is in the adverse possession of another, there can be no delivery, and, hence, no gift. *Ib.*

GRAND JURY.

CRIMINAL PRACTICE: GRAND JUROR: CHALLENGE OF. The challenge of a grand juror can be made only on the ground that the juror is the prosecutor or complainant, or a witness on the part of the prosecution. R. S., secs. 1772, 1773. *The State v. Holcomb*, 371.

GUARDIAN AND WARD.

1. STATUTE OF LIMITATIONS: GUARDIAN'S BOND. The statute of limitations begins to run against the ward, from the time of the guardian's final settlement, in an action on the latter's bond for failure to pay the amount found due the ward on such settlement. *The State ex rel. Yeoman v. Hoshaw*, 193.
2. GUARDIAN AND WARD: FINAL SETTLEMENT: SURETIES. The judgment for the ward against the guardian on the final settlement is

conclusive on the sureties on his bond, as it is likewise conclusive for them against the ward. *Ib.*

## HIGHWAYS.

See ROADS AND HIGHWAYS.

## HOMESTEAD AND EXEMPTIONS.

1. HOMESTEAD. The owner of a homestead, which is not liable to execution for a debt against him, can convey it to a purchaser, who will take it exempt from the same liability. *Holland v. Kreider*, 59.
2. ———. The law in force, at the time of the death of the husband, determines the homestead rights of the widow. *Davidson v. Davis*, 440.
3. DEVISE OF LAND TO WIDOW: HOMESTEAD. A widow cannot take a devise of land under her husband's will and also claim a homestead in his lands. *Ib.*
4. ———: ———: ELECTION. In such case she must make her election, but no formal act of election on her part is required, and it may be determined from her acts and conduct whether she chooses to accept the provisions of the will or to take a homestead. *Ib.*
5. ———. The widow's right of election in such case is not transmissible to her heirs. *Ib.*
6. CONSTRUCTION OF STATUTE: HOMESTEAD: TENANTS IN COMMON. Under section 2291, Revised Statutes of United States, where both father and mother die before perfecting an entry of a homestead, and receiving a patent therefor, their heirs are entitled to a patent upon making proof of the facts required by said section, and take as tenants in common. *Crumb v. Hambleton*, 501.
7. HOMESTEAD, RIGHT OF WIDOW TO ALIENATE. Under Revised Statutes, section 2693, the homestead vests in the widow and minor children, upon the death of the husband, and continues for their joint benefit until the youngest child shall have attained its legal majority, and the widow has no right to dispose of, abandon or otherwise deal with it to the impairment of the children's right to use it as a homestead. *Rhorer v. Brockhage*, 544.
8. ———: RIGHT OF WIDOW AND MINOR CHILDREN TO. Under the present law (R. S., sec. 2693) the widow and minor children are entitled to a homestead, regardless of whether or not the decedent left any debts. *Ib.*
9. ———: RIGHTS OF MINOR CHILDREN. The rights of the minor children in the homestead are in no manner affected by its abandon-

ment by the mother. Although they may accompany her to another home, their rights in the homestead continue. *Ib.*

10. ——— : FAILURE OF OFFICER TO ASSIGN: SALE NOT VOID. The failure of a sheriff, selling, under execution, land which contains a homestead, to assign such homestead to the debtor does not render the sale void. *Crisp v. Crisp*, 630.
11. ———. The court may, in ejectment brought for the premises by the purchaser at the sale, cause the homestead to be assigned. *Ib.*

### HUSBAND AND WIFE.

1. WIFE'S CHATTELS, WAIVER OF RIGHT TO BY HUSBAND, AT COMMON LAW. While, at common law, the chattels of the wife, vested in the husband by virtue of the marriage, yet he could waive his right thereto and permit her to retain them. He could, by his declarations, acts and dealings, release her property from his marital rights. *Clark v. Clark*, 114.
2. HUSBAND BORROWING WIFE'S MONEY. Where, instead of asserting his claim, as husband, to his wife's money, he borrows the same, with the agreement and understanding that it is to be repaid or accounted for to her, he will, in equity, be regarded as her debtor. *Ib.*
3. ——— : SURETY. Where the husband receives money from the wife and executes to her therefor his note, with another as surety thereon, the transaction of itself shows that the money was not intended as a gift, and creates a valid obligation on the part of the husband to pay the note, which the wife can enforce against both him and the surety. *Ib.*
4. JUDGMENT, WRITTEN CONFESSION OF BY HUSBAND AND WIFE. A judgment rendered upon the mere written confession of a husband and his wife, filed in court, while it might be valid against the husband, can have no operation or force against the wife, whether it be regarded as simply a moneyed judgment against the wife, or as a judgment possessing attributes of that nature combined with others, which authorized a sale of her land for the enforcement of a mechanic's lien. *Per Sherwood, J. Coe v. Ritter*, 277.
5. HUSBAND AND WIFE: PRACTICE: RECEIPT. A receipt, by the husband, acknowledging satisfaction for the injury to the furniture, and for the payment by him of physicians' bills incurred by reason of the injuries to his wife, and for the expenses of a truss for her, is no bar to an action for the injuries to the wife's person. *Smith v. Warden*, 382.
6. ———. A husband, in the absence of authority from the wife, cannot now dispose of or settle her right of action for injuries done to her person. *R. S.*, 1879, sec. 3296. *Ib.*

7. EVIDENCE: HUSBAND, COMPETENCY AS WITNESS. A husband, who is a co-plaintiff with his wife in an action under Revised Statutes, section 2121, for the death of their son, is a competent witness on the trial of the cause. *Bell v. The Hannibal & St. Joseph Railway Company*, 599.

## INDICTMENT.

See PLEADING, CRIMINAL.

## INJUNCTION.

INJUNCTION. Injunction will lie to prevent a sale under an order of the probate court obtained after unreasonable delay. *Gunby v. Brown*, 253.

## INSTRUCTIONS,

1. INSTRUCTION. An instruction should not be given where there is no evidence to authorize it. *Brown v. The Covenant Mutual Life Insurance Company*, 51.
2. ———: INSTRUCTIONS. An instruction for murder in the second degree is properly refused where the evidence shows the offence to be murder in the first degree, or nothing. *The State v. Collins*, 245.
3. ———: PRACTICE: INSTRUCTIONS. In the trial of an action for damages for fraudulent representations touching the financial condition of a person, the jury should not be left to conjecture as to what are material false statements. *Anderson v. McPike*, 293.
4. CRIMINAL PRACTICE: MURDER: INSTRUCTION. On a trial for murder, an instruction is not erroneous which tells the jury that if they believe the defendants guilty of murder in the first or second degrees, but have a doubt as to which degree, they will give them the benefit of such doubt, and convict of the lesser degree. *The State v. Anderson*, 309.
5. ———: INSTRUCTION. An instruction held not erroneous because it did not confine the belief of the jury to the evidence, they having been sworn to try the case on the evidence, and it appearing they could not possibly have supposed they were permitted by the instruction to base their verdict upon anything but the testimony in the case. *Ib.*
6. ———: BILL OF EXCEPTIONS: INSTRUCTIONS. The Supreme Court will not presume that proper instructions were given by the trial court for the defendant where the bill of exceptions only disclosed that instructions were given for the state, and that others were asked for by the defendant and refused. *Ib.*

7. PRACTICE : INSTRUCTION. A party cannot complain of an instruction given at his own request. *Musser v. Adler*, 445.
8. INSTRUCTIONS : COMMENTING ON EVIDENCE. While an instruction should not comment on the evidence, nor single out one or more facts and give them undue prominence, yet an instruction in an action for the recovery of the value of services rendered as an attorney, is not so objectionable, which tells the jury that in considering the value of the plaintiff's services they should take into consideration the magnitude of the cases in which they were rendered, the skill required to perform the same so far as possessed by plaintiff ; the time required in the trial and preparation of the causes, and all the facts and circumstances touching the services so rendered. *Ib.*
9. CRIMINAL LAW : MURDER : PRACTICE : INSTRUCTIONS. On a trial for murder, the court should not instruct for a grade of homicide not shown by the evidence. *The State v. Wilson*, 520.
10. ——— : PLEADING : PRACTICE : EVIDENCE. An indictment for felonious assault, under Revised Statutes, section 1262, and a series of instructions applicable to that offence approved, and the evidence in the case held sufficient to sustain a conviction. *The State v. Jones*, 623.
11. ——— : PRACTICE : INSTRUCTIONS. In a prosecution for felonious assault, under Revised Statutes, section 1262, where the evidence shows that grade of offence, it is not error to refuse to instruct that the defendant may be awarded a less degree of punishment than imprisonment in the penitentiary. *Ib.*

INTENT.

INTENT. An intention on the part of the accused to do the other party some bodily harm is essential to constitute an assault. *The State v. Sears*, 169.

See FORGERY, 4.

INTERPLEA.

See ATTACHMENT.

JUDGMENTS.

1. JUDGMENT, REVERSAL OF. Where a judgment is reversed with the usual mandate to restore the parties to the same condition in which they were before its rendition, it becomes mere waste paper, and the parties are allowed to proceed in the trial court to obtain a final determination of their rights in the same manner and to the same extent as if the cause had not been decided in the trial court. Neither party in the subsequent prosecution of the cause can suffer detriment or receive assistance from the former adjudication. *Crispen v. Hannoran*, 160.

2. **PRACTICE IN SUPREME COURT: JUDGMENT AGAINST A MARRIED WOMAN.** Where a judgment is erroneously rendered against a married woman, the Supreme Court can amend the same by striking out her name. *Ib.*
3. **GUARDIAN AND WARD: FINAL SETTLEMENT: SURETIES.** The judgment for the ward against the guardian on the final settlement is conclusive on the sureties on his bond, as it is likewise conclusive for them against the ward. *The State ex rel. Yeoman v. Hoshaw*, 193.
4. **JUDGMENT, WRITTEN CONFESSION OF BY HUSBAND AND WIFE.** A judgment rendered upon the mere written confession of a husband and his wife, filed in court, while it might be valid against the husband, can have no operation or force against the wife, whether it be regarded as simply a moneyed judgment against the wife, or as a judgment possessing attributes of that nature combined with others, which authorized a sale of her land for the enforcement of a mechanic's lien. *Per Sherwood, J. Coe v. Ritter*, 277.
5. **PRACTICE: PARTIES: JUDGMENT: ENFORCEMENT OF MECHANIC'S LIEN.** Where, in a proceeding to enforce a mechanic's lien, the trustee and beneficiary in a prior deed of trust are not made parties, the judgment will have no force or effect as to the beneficiary in, or purchaser under, the deed of trust, and the purchaser, at a sale upon the mechanic's lien, will only acquire the equity of redemption, and the right to the premises after the trust lien has been paid. *Ib.*
6. **JUDGMENT NUNC PRO TUNC: RIGHTS OF THIRD PARTIES.** A judgment, *nunc pro tunc*, will not be allowed to operate to the prejudice of the rights of third parties acquired in good faith between the time of the rendition of the original judgment and the entry of the judgment *nunc pro tunc*. *Ib.*
7. **JUDGMENT: EXECUTION: SALE.** A sale under an execution issued upon an original judgment, which conforms to a judgment *nunc pro tunc*, instead of such original judgment, is invalid. *Ib.*
8. **EQUITY: FRAUD IN OBTAINING JUDGMENT.** Where a judgment is fraudulently obtained against one, in violation of a compromise agreement, any title acquired thereunder by the plaintiff in the suit or by any one having notice of the injustice practiced in obtaining the judgment, is voidable in equity as against the defendant in such suit or those claiming under him. *Murphy v. Smith*, 333.
9. **COMPROMISE OF SUIT: JUDGMENT FOR COSTS.** A court is not authorized to render a judgment for costs in carrying out a compromise of the parties to the suit, except in pursuance of a stipulation to that effect entered of record, or the consent of parties given in open court. *Ib.*
10. **FRAUDULENT JUDGMENT, SALE UNDER: REMOVAL OF CLOUD ON TITLE.** The evidence in this case reviewed and held, reversing the finding of the trial court, that a purchaser at a sheriff's sale and his vendee

bought with notice of the fraud practiced in obtaining the judgment and the title asserted thereunder removed as a cloud on defendant's title by divesting it out of plaintiff and vesting it in defendant. *Ib.*

11. ——— : SERVICE OF PROCESS : JUDGMENT BY DEFAULT. In order to support a judgment by default against a corporation, it must appear of record that the person who the return of the officer shows was served with process, has such a relation to the corporation that service on such corporation was tantamount to service on the corporation. *Cloud v. Inhabitants of Pierce City*, 357.
12. JUDGMENT WITHOUT PROCESS. Where a party has not been brought into court by service of any process, a judgment rendered against him is *coram non judice*, and void. *Ib.*
13. JURISDICTION : PROCESS : JUDGMENT. Generally the recital of jurisdiction, or of service of process contained in the judgment will be construed in connection with the whole record, and will be deemed to refer to the kind of service shown by the other parts of the record. *Ib.*
14. ——— : ——— : ———. Where judgment has been rendered against a defendant corporation upon insufficient process, and the successor of such corporation appears in court and moves, for that reason, to set aside the judgment, and asks leave to plead to the plaintiff's petition, which is denied, such action does not, by relation, give jurisdiction where none existed before, nor confer on the judgment rendered a retrospective validity. *Ib.*

See PRACTICE, CIVIL, 37.

#### JURISDICTION.

1. JURISDICTION : PROCESS : PRACTICE. Where an original petition states a cause of action against individuals, as constituting a copartnership, and the amended petition states one against a corporation, the latter, before the court can have jurisdiction to render judgment, must be in court on voluntary appearance, or be brought in by service of process, and this is the case, although the firm name was the same as that of the corporation, and the stockholders in the latter composed said firm. *Thompson v. Allen*, 85.
2. PROCESS, JURISDICTIONAL RECITAL OF IN RECORD, CONTRADICTION OF. Although the record contains the jurisdictional recital that "defendants have been duly served with process," it is competent to overthrow such recital by showing, by other parts of the record of equal dignity and importing equal verity, that such recital is untrue. And the return of the sheriff is a part of the record itself, and may, when radically defective, be used to rebut the presumption arising from recitals of service contained in other portions of the record. *Cloud v. Inhabitants of Pierce City*, 357.
3. JURISDICTION : PROCESS : JUDGMENT. Generally, the recital of jurisdiction or of service of process contained in the judgment, will be

construed in connection with the whole record, and will be deemed to refer to the kind of service shown by the other parts of the record. *Ib.*

4. ——— : ——— : ———. Where judgment has been rendered against a defendant corporation upon insufficient process, and the successor of such corporation appears in court and moves, for that reason, to set aside the judgment and asks leave to plead to plaintiff's petition, which is denied, such action does not, by relation, give jurisdiction where none existed before, nor confer on the judgment rendered a retrospective validity. *Ib.*
5. RAILROAD : KILLING STOCK : JURISDICTION : JUSTICE OF PEACE. In an action brought before a justice of the peace against a railroad for double damages for killing stock, the fact that the killing occurred in the township where the suit was brought, or in an adjoining township, is a jurisdictional one. It is not sufficient that such jurisdictional fact be averred in the statement ; it must also be shown by the evidence. *Backenstoe v. The Wabash, St. Louis & Pacific Railway Co.*, 492.
6. ——— : ——— : ———. Proof simply that the killing occurred within the corporate limits of a town is not sufficient to warrant the jury in finding that it occurred in the township charged in the statement. *Ib.*
7. PARTNERSHIP : RECEIVER, POWER OF COURT TO APPOINT : JURISDICTION. The circuit court has original jurisdiction in all matters of equity, and has inherent power, independent of any statute authorizing it, to appoint a receiver in the settlement of partnership affairs, where there is no statute depriving it of such power. *Cox v. Volkert*, 505.
8. JURISDICTION : EQUITY : POWER TO SET ASIDE JUDGMENT. The circuit court, being a court of original chancery powers in this state, has jurisdiction to enjoin the issuance of execution upon a judgment procured by fraud in the court of common pleas, notwithstanding such judgment has been affirmed by the Supreme Court. *The State ex rel, Phelan v. Engelmann*, 551.
9. ——— : MANDAMUS. Where the circuit court has jurisdiction, such jurisdiction cannot be questioned or controlled by mandamus, however erroneously it may be exercised. *Ib.*
10. PRACTICE : JURISDICTION : APPEAL. The circuit court does not, by granting an appeal, lose jurisdiction in a cause, and a bill of exceptions may be filed and acted upon after appeal granted. *Shaw v. Shaw*, 594.
11. ACTIONS EX DELICTO : JURISDICTION. In actions *ex delicto* the damages claimed in the petition determine the jurisdiction of the court, and if the plaintiff recover any damages he shall recover his costs. R. S., sec. 995. *Vineyard v. Lynch*, 684.
12. ——— ; ———. The test of jurisdiction in actions *ex delicto* is the

aggregate amount of damages prayed for, and not the amount of damages prayed for in a single count. And this is true, whether the action be for a wrong in the nature of a tort, or otherwise. *Ib.*

## JURY.

1. PRACTICE, CRIMINAL: JURORS, PANEL OF. The fact that in a trial for murder, a panel of forty qualified jurors was procured on the sixth, when the cause was not to be tried until the tenth, constitutes no error, as the defendant, or his counsel, could have re-examined them on the tenth, if he had so desired, to ascertain whether any of them had become disqualified between the dates mentioned. *The State v. Collins*, 245.
2. ———: SEPARATION OF JURY. The temporary separation of a juror from his fellows, the juror being under the charge of an officer while the others remained locked in their room, and nothing being said to such juror about the trial, constitutes no ground for a reversal of the judgment. *Ib.*
3. ———: JURORS: OBJECTION TO PANEL AFTER VERDICT. It is too late after verdict to object to the panel of jurors, or to the manner of its selection. *Ib.*
4. ———: ———: PROVINCE OF JURY. Where counsel cannot agree as to the evidence in a cause, or misstate the evidence, in argument, to the jury, it is the peculiar province of the jury, and not of the court to determine what the evidence was. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railway Company*, 421.

## JURORS.

See JURY.

## JUSTICES' COURTS.

1. RAILROAD: KILLING STOCK: JURISDICTION: JUSTICE OF PEACE. In an action brought before a justice of the peace against a railroad for double damages for killing stock, the fact that the killing occurred in the township where the suit was brought, or in an adjoining township, is a jurisdictional one. It is not sufficient that such jurisdictional fact be averred in the statement; it must also be shown by the evidence. *Backenstoe v. The Wabash, St. Louis & Pacific Railway Company*, 492.
2. ———: ———: ———. Proof simply that the killing occurred within the corporate limits of a town is not sufficient to warrant the jury in finding that it occurred in the township charged in the statement. *Ib.*
3. JUSTICE OF PEACE: APPEAL FROM: DISMISSAL OF SUIT. Where, on an appeal from a justice of the peace, the transcript shows that the justice acquired jurisdiction of the defendant, it having filed its motion to set aside the judgment by default, a motion in the cir-

cuit court to dismiss the suit because of service of summons in the wrong township, should not be sustained. *Kelly v. The Chicago, Rock Island & Pacific Railroad Company*, 681.

4. ——— : ———. The circuit court should have proceeded under Revised Statutes, section 3052, to try the case *de novo*. *Ib.*

#### LACHES.

——— : ——— : LACHES. The profile and map of the route of the defendant company through the county was filed, as required by statute (G. S. 1865, p. 337), in the office of the clerk of the county court in April, 1878, and the present action to restrain the defendant from using the highway was instituted in January, 1882. *Held*, there was no such delay on the part of the county as to preclude it from asserting its rights against the company. *The State ex rel., Mahan v. The St. Louis, Keokuk & Northwestern Railway Company*, 288.

#### LACLEDE GAS LIGHT COMPANY.

See CONTRACTS, 5.

#### LAND AND LAND TITLES.

1. LAND TITLE : ACCRETIONS. Where the intermediate space between a survey on the main land of the Missouri river and a surveyed island at the times of the surveys consisted of a slough, and since then the slough has so filled up as to connect the island and the main land, and to make them one continuous tract of land, the adjacent owners of the island and the survey are entitled to the accretions to their respective lands, but if the slough simply filled up from the bottom, or by deposits within its bed, and the accretions did not form on the one side or the other, then the center of the slough, as it was before the water left it, is the boundary between the survey and the island. *Buse v. Russell*, 209.
2. ACCRETIONS. Where the shore lines of two tracts of land, divided by a water course, receive accretions until they come together, the line of contact will then be the division line. *Ib.*
3. ———. If the slough gradually filled up as the water receded, the same principle is applied and the new land belongs to the riparian owner, from whose shore the water receded, and it is immaterial whether the water was navigable in the common law sense or general acceptance of the term, or was a non-navigable stream. *Ib.*
4. LAND TITLE : ISLAND : ALLUVION. If the island was washed away, in whole or in part, after it was surveyed, and then reformed on the same head, the owner of it, as it was before it was so washed, would be entitled to it, but if it was washed away, and the land sought to be recovered was made by deposits to and against the survey of the main land, then such deposits became the property of the owner of the survey. *Ib.*

5. LAND AND LAND TITLES : TITLE BOND. SURRENDER OF. The holder of a title bond to land, who surrenders it to him who executed it, thereby obliterates whatever equitable right he may have theretofore had in the land. *Anderson v. McPike*, 293.
6. EVIDENCE : ADMISSIONS OF ONE IN POSSESSION OF LAND. The admissions of one, since deceased, respecting his title to land, made while in possession of the land, are competent evidence, even as against strangers. *Ib.*
7. TITLE TO LAND : UNRECORDED TITLE BOND : NOTICE. A purchaser of land for value, without notice of an unrecorded title bond, will take a clear title against any right growing out of such bond. *Ib.*
8. LAND, PURCHASE OF : POSSESSION : VENDOR AND VENDEE. Where the vendor of land, at the time of contracting, refuses to put the vendees in possession, and the conveyance is accepted on such terms, it is not the vendor's duty to put the vendees in possession. *Ib.*
9. LANDLORD AND TENANT : ATTORNMENT : POSSESSION : PURCHASER UNDER TRUST DEED. The purchaser of land at a trustee's sale, made at the request of the administrator of the beneficiary, acquires all the title of the mortgageor, and the beneficiaries under the trust deed, and as against them is entitled to the possession ; and a tenant, holding under authority of the administrator's lessee, who attorns to the purchaser, becomes the latter's tenant, and thereafter the tenant's possession is the possession of the purchaser. *Lindenbower v. Bentley*, 515.

## LANDLORD AND TENANT.

1. LANDLORD AND TENANT : ATTORNMENT : POSSESSION : PURCHASER UNDER TRUST DEED. The purchaser of land at a trustee's sale, made at the request of the administrator of the beneficiary, acquires all the title of the mortgageor and the beneficiaries under the trust deed, and as against them is entitled to the possession ; and a tenant, holding under authority of the administrator's lessee, who attorns to the purchaser, becomes the latter's tenant, and thereafter the tenant's possession is the possession of the purchaser. *Lindenbower v. Bentley*, 515.
2. — : — : LANDLORD AND TENANT. A tenant to whom land is rented is entitled to its exclusive possession, and being in exclusive possession, the landlord out of possession cannot maintain trespass. *Ib.*
3. POSSESSION OF TENANT : SECOND LEASE. The possession of a tenant is the possession of his lessor, and the fact that the parties claiming the adverse title without the knowledge of such lessor prevailed on tenant while so in possession under the first lease, to accept a lease from them, cannot affect the possession of such first lessor. *Farrar v. Heinrich*, 521.

4. ——— : ———. The fact that the second lessors may have made their lease under the mistaken belief that the tenant was a squatter and in ignorance of the existence of the first lease, cannot affect the rights of the first lessor. *Ib.*
5. ——— : ———. If neither party in fact knew, nor had reason to suspect the existence of the lease by the other, and although both acted in good faith in making their respective leases, still such facts cannot help the second lessor. In such circumstances the familiar doctrine and duty of the court is not to interfere, but to leave the parties as it found them. *Ib.*

## LARCENY.

1. CRIMINAL LAW : LARCENY : POSSESSION. Defendant pastured cattle for one T. They escaped and when they returned to T's there were two with them that did not belong to the latter. Defendant claimed the two as his and sold them to T. *Held*, in a prosecution against defendant for the larceny of the two, that this tended to prove that they had previously been in his possession. *The State v. Jackson*, 18.
2. ——— : LARCENY : VENUE. One who steals property in one county and takes it into another may be indicted, tried and convicted in the latter county. Where one steals cattle in one county, and they escape from him, and he pursues them into another county, and there takes possession of them as his property, and disposes of them, as such, he is guilty of stealing the property in the latter county. *R. S.*, sec. 1691. *Ib.*
3. CRIMINAL LAW : LARCENY : EVIDENCE. Defendant and his confederates inveigled the owner of horses into a sale stable, in St. Louis, where another confederate acted in the role of a buyer, and still another as a friend of all parties, in consummating a trade, and while his confederates were endeavoring to trick the owner of the horses into believing that he had traded them for certain mules, which the owner refused to do, the defendant took the horses and went off with them against the will and remonstrance of the owner, *Held*, that defendant was properly convicted of grand larceny. *The State v. Zumbunson*, 111.

## LEASE.

1. RECEIVER, EFFECT OF APPOINTMENT : LESSOR AND LESSEE. The appointment of a receiver does not affect the rights of parties to a lease executed by those for whom he acts, and whatever defences, counter-claims, or set-offs, the lessee would have had in a suit by the lessors are available to the lessee, in a suit by the receiver, and the lessee may plead any failure of the lessors to perform their part of the contract. *Cox v. Volkert*, 505.
2. CONTRACT : CONSTRUCTION OF LEASE. Where, by the terms of a lease, the lessors agree to put in certain new machinery when needed, the necessity for the same to be decided by referees, in case the parties cannot agree, and the lessors refuse to join in selecting referees, the lessee may put in suitable machinery and

charge the cost thereof to the lessors, and the latter cannot take advantage of their wrongful act in failing to join in the selection of referees. But the lessee will not be entitled to rental for the new machinery provided by him, nor to an allowance for losses incurred by him by reason of being unable to conduct his business while putting in the new machinery. *Ib.*

3. POSSESSION OF TENANT : SECOND LEASE. The possession of a tenant is the possession of his lessor, and the fact that the parties claiming the adverse title without the knowledge of such lessor prevailed on tenant while so in possession under the first lease, to accept a lease from them, cannot affect the possession of such first lessor. *Farrar v. Heinrich*, 521.
4. ——— : ———. The fact that the second lessors may have made their lease under the mistaken belief that the tenant was a squatter and in ignorance of the existence of the first lease, cannot affect the rights of the first lessor. *Ib.*
5. ——— : ———. If neither party in fact knew, nor had reason to suspect the existence of the lease by the other, and although both acted in good faith in making their respective leases, still such facts cannot help the second lessor. In such circumstances the familiar doctrine and duty of the court is not to interfere, but to leave the parties as it found them. *Ib.*

#### LESSOR AND LESSEE.

See LEASE.

#### LICENSE.

See ST. LOUIS CITY, 2.

#### LIEN.

VENDOR'S LIEN. One who buys land, subject to a vendor's lien, with notice of the same, takes it subject to such lien. *Bronson v. Wanzer*, 408.

See MECHANIC'S LIEN.

#### LIFE ESTATE.

1. RAILROAD : CONDEMNATION PROCEEDING : LIFE ESTATE. The owner of a life estate in land condemned for a right of way for a railroad, is entitled to the same estate in the money paid into court under the condemnation proceedings. *The Kansas City, Springfield & Memphis Railway Co. v. Weaver*, 473.
2. ——— : ——— : ———. A judgment creditor of the remainderman in such life estate can assert no claim to any part of said money during the continuance of the life estate. *Ib.*

8. LIFE ESTATE, CONVEYANCE BY OWNER OF: REMAINDERMEN. A suit to enforce a deed, made by the owner of the life estate for the fee of land, cannot be maintained against the remaindermen, although they are the heirs of the grantor, and the conveyance by the latter contained covenants of general and special warranty. *Barlow v. Delaney*, 583.

DEED, CONSTRUCTION OF: HABENDUM: LIFE ESTATE: REMAINDER. *Bean v. Kenmuir*, 666.

### LIMITATIONS.

1. STATUTE OF LIMITATIONS: DISABILITY OF MINORITY: DISAFFIRMANCE OF DEED BY HEIRS. Where a married woman, who is a minor, with the concurrence of her husband, conveys land which descended to her from her ancestor, and dies before attaining her majority, leaving as her sole heir the plaintiff, also a minor, the latter is vested with the right to disaffirm such conveyance, and has the statutory period of three years after attaining her majority within which to do so, and the institution of an action within such time for the recovery of said land is a valid disaffirmance of the conveyance. *Harris v. Ross*, 89.
2. ———: ———: ———. The conveyance of the grantor and her husband was effectual to pass the title during their joint lives, or during his life, if a tenant by curtesy, and the wife not having survived the particular estate, no cause of action ever accrued to her, and the statute of limitations never commenced to run in her favor; the heir, therefore, was the first person entitled to sue, and against whom the statute first began to run, and, being an infant, she had the full statutory period within which to disaffirm the deed and commence her action. *Ib.*
3. STATUTE OF LIMITATIONS: VOID TAX DEED. A tax deed omitting the recital "for the payment of taxes, interest and costs then due and unpaid on said real property," is void on its face, and the special three years statute of limitations does not run in favor of the person holding possession under such deed. *Hopkins v. Scott*, 140.
4. STATUTE OF LIMITATIONS: GUARDIAN'S BOND. The statute of limitations begins to run against the ward, from the time of the guardian's final settlement, in an action on the latter's bond for failure to pay the amount found due the ward on such settlement. *The State ex rel. Yeoman v. Hoshaw*, 193.
5. ADMINISTRATOR: SALE OF REALTY TO PAY DEBTS: LIMITATION. There is no statute of limitations in this state prescribing the time within which an administrator must procure an order for the sale of real estate to pay the debts of the estate, and, such being the case, he must do so within a reasonable time. *Gunby v. Brown*, 253.
6. STATUTE OF LIMITATIONS. The statute of limitations commenced to run against the corporation only from the time it had knowl-

edge of the agreement and acquisition of the bonds. *Bent v. Priest*, 475.

7. QUESTION OF LAW: JURY: PRACTICE. Whether an instrument purporting to be an acknowledgment of a debt is sufficient to take it out of the bar of the statute of limitations is a question for the court, and whether the debt sued for is the one acknowledged is a question for the jury. *Mastin v. Branham*, 643.
8. STATUTE OF LIMITATIONS: ACKNOWLEDGMENT OF DEBT, SUFFICIENCY OF. The acknowledgment to remove the bar of the statute of limitations (R. S., sec. 3248) must be in writing and signed by the party making it, and must be a direct and an unqualified admission of a subsisting debt which the signer is liable for and is willing to pay. *Ib.*
9. ———: ———. An acknowledgment will be sufficient although contained in an application made by a debtor to an insurance company for a policy on his life, when made at the request of the creditor and for his benefit. *Ib.*
10. ———: ———. The acknowledgment may be made before the debt is barred, and when so made the statute of limitations will begin to run from the time of the acknowledgment. *Ib.*

ADMINISTRATION: NOTICE OF EXHIBITION OF DEMAND: LIMITATION.  
*Wernse v. McPike*, 565.

#### MACHINERY.

See MASTER AND SERVANT.

#### MALICIOUS PROSECUTION.

**MALICIOUS PROSECUTION: DAMAGES.** In an action for malicious prosecution, founded on a prosecution without probable cause of two of five counts of an information, the plaintiff, in order to recover actual damages, is not required to distinguish by his evidence the damages arising from the prosecution of the two counts sued on from those incident to the other counts. The defendant cannot, by uniting in the information groundless accusations with those for which probable cause might exist, escape liability because of the plaintiff's inability to adjust the damages between the two. *Boogher v. Bryant*, 42.

#### MANDAMUS.

1. MANDAMUS. Mandamus is an appropriate remedy to compel the restoration of a highway, by a railway, to its proper condition, and, in this respect, to require the company to perform its charter duties. *The State ex rel. Morris v. The Hannibal & St. Railway Company*, 13.

2. ——— : RELATORS : PRIVATE CITIZENS. It is sufficient for the relators in such proceeding to show that they are citizens and thus interested in the performance of a public duty. *Ib.*
3. RAILROAD : HIGHWAY, OBSTRUCTION OF. In a mandamus proceeding to compel a railway company to so construct its road as not to prevent the public from using a specified part of a highway, it is no defence that the track had formerly been placed in the highway by another railway company. Such fact is no justification of the continuance of the obstruction of the highway by defendant to the entire exclusion of the public. *Ib.*
4. MUNICIPAL CORPORATION : MANDAMUS. Mandamus cannot issue against a municipal corporation until the claim on which it is based is first reduced into judgment ; and this is necessarily so, where the mandamus proceedings are wholly based on Revised Statutes, section 2415, requiring that an execution against a city, etc., be first returned unsatisfied before mandamus can issue. *Cloud v. Inhabitants of Pierce City*, 357.
5. ——— : MANDAMUS. Where the circuit court has jurisdiction, such jurisdiction cannot be questioned or controlled by mandamus, however erroneously it may be exercised. *The State ex rel. Phelan v. Engelmann*, 551.

#### MANSLAUGHTER,

See CRIMINAL LAW, 22.

#### MASTER AND SERVANT.

1. MASTER AND SERVANT : MACHINERY : PRACTICE. In an action for an injury to a servant resulting from the negligence of the master in furnishing him with defectively constructed machinery to use in his work, the servant cannot recover on the ground that the master failed to keep his machinery in repair. *Current v. The Missouri Pacific Railway Co.*, 62.
2. ——— : PLEADING. A petition founded on the negligence of the master in failing to keep the machinery used by his servants in repair, must allege that the master knew its condition, or, by the exercise of due care, might have known it. *Ib.*
3. ——— : MACHINERY : HIDDEN DEFECTS. An employer is not liable for an injury to the servant occasioned by a hidden defect in machinery furnished for his use, unless the employer knew, or, by the exercise of reasonable care, could have discovered such defect. *Ib.*
4. VICE-PRINCIPAL. Where the master appoints an agent with a superintending control over his work, and with power to employ and discharge hands, and to direct and control their movements in and about their work, such agent is a vice-principal and his negli-

gence is that of the master. *Stephens v. The Hannibal & St. Joseph Railway Co.*, 221.

5. MASTER AND SERVANT: ORDER OF MASTER INVOLVING EXTRA HAZARD TO SERVANT. Where the master gives an order to a servant to do an act at a time, or under circumstances which render the doing of the act, extra hazardous, and the servant in obeying the order receives an injury, the master is liable, unless to obey the order was plainly to imperil life or limb. *Ib.*
6. ———: RISKS ASSUMED BY SERVANT: NEGLIGENCE. A servant assumes the ordinary and natural risks incident to the service in which he engages, and the master is not liable for the servant's want of care. *Renfro v. The Chicago, Rock Island & Pacific Railway Co.*, 302.
7. THE EVIDENCE in this case examined, and the accident, which resulted in the death of plaintiff's husband, who was in defendant's service, held to have been attributable to the risks incident to the business in which the deceased was engaged, coupled with the want of care on the part of himself and a fellow servant. *Ib.*
8. MASTER AND SERVANT: MACHINERY: NEGLIGENCE. It is the duty of an employer to use reasonable and ordinary care and foresight in procuring appliances for the use of his servants, and in keeping the same in repair. But he is not required to furnish absolutely safe machinery, and what is reasonable and ordinary care depends upon the nature and character of the implement, and the dangers to be encountered in its use. *Covey v. The Hannibal & St. Joseph Railway Co.*, 635.
9. ———: ———: DAMAGES. The right of the servant to recover damages for injuries incurred in the use of defective machinery, depends upon proof that the injuries were so incurred, and that the master was aware of the defect, or that the use of reasonable care on his part would have disclosed the defect. *Ib.*
10. ———: AGENT, KNOWLEDGE OF. Knowledge of defects on the part of the agents of the employer, who are intrusted with the duty of procuring machinery and keeping the same in repair, is to be attributed to the employer. *Ib.*
11. ———: DUTY OF SERVANT: LATENT DEFECTS. While the servant is not bound to search for latent defects, he must take notice of those which are open to his observation, and of which he has knowledge, and if, with such information, he continues to use the implement, he does so at his own risk, as to injuries arising from such known defects. *Ib.*
12. MASTER AND SERVANT: VICE-PRINCIPAL. It is error to single out a servant upon whom none of the duties of the master, as to furnishing proper appliances, and keeping the same in repair, devolve, and predicate a right to recover upon such servant's knowledge of defects, or his want of care. *Ib.*

## MECHANIC'S LIEN.

1. PRACTICE : PARTIES : ENFORCEMENT OF MECHANIC'S LIEN. Where, in a proceeding to enforce a mechanic's lien, the trustee and beneficiary in a prior deed of trust are not made parties, the judgment will have no force or effect as to the beneficiary in, or purchaser under, the deed of trust, and the purchaser, at a sale upon the mechanic's lien, will only acquire the equity of redemption, and the right to the premises after the trust lien has been paid. *Coe v. Ritter*, 277.
2. MECHANIC'S LIEN : ACCOUNT OF DEMAND : EVIDENCE. In a proceeding to enforce a mechanic's lien, the lienor must stand or fall by the account which he files, and the dates and items which he specifies, and cannot defeat or postpone a prior lienor or incumbrancer by matter *in pais*. *Ib.*

## MINORS.

1. STATUTE OF LIMITATIONS : DISABILITY OF MINORITY : DISAFFIRMANCE OF DEED BY HEIRS. Where a married woman, who is a minor, with the concurrence of her husband, conveys land which descended to her from her ancestor, and dies before attaining her majority, leaving as her sole heir the plaintiff, also a minor, the latter is vested with the right to disaffirm such conveyance, and has the statutory period of three years after attaining her majority, within which to do so, and the institution of an action within such time for the recovery of said land, is a valid disaffirmance of the conveyance. *Harris v. Ross*, 89.
2. ——— : ——— : ———. The conveyance of the grantor and her husband was effectual to pass the title during their joint lives, or during his life, if a tenant by curtesy, and the wife not having survived the particular estate, no cause of action ever accrued to her, and the statute of limitations never commenced to run in her favor; the heir, therefore, was the first person entitled to sue, and against whom the statute first began to run, and, being an infant, she had the full statutory period within which to disaffirm the deed and commence her action. *Ib.*

## MINORITY.

See MINORS.

## MISDEMEANOR.

MISDEMEANOR : OFFENCE, WHAT NECESSARY TO CONSTITUTE. There can be no offence or misdemeanor, except as the result of the violation of some duty plainly imposed by a competent law-making power. *The City of Kansas v. Corrigan*, 67.

## MORTGAGES AND DEEDS OF TRUST.

MORTGAGE : AFTER-ACQUIRED PROPERTY : LEGAL TITLE : EQUITY. A

mortgage of chattels not *in esse*, or not owned by the mortgageor at the execution of the mortgage, will not pass the legal title to such after-acquired property, and the mortgagee, to render his lien effectual, must assert it in a court equity. *France v. Thomas*, 80.

MUNICIPAL CORPORATIONS.

1. CITY OF KANSAS: STREET RAILWAYS: ORDINANCE. Section one of the ordinance of June 29, 1880, of the City of Kansas, relating to street railways, does not require such railways, or any officer thereof, to pave the street on which their cars are operated. *The City of Kansas v. Corrigan*, 67.
2. ORDINANCE: STREET RAILWAY COMPANY: CONTRACT. Where an ordinance of a city, which grants to a horse railway company the privilege of using its streets, requires such railway to keep portions of the street, on which it operates, in good repair, the city cannot, by a subsequent ordinance, compel the company to pave such portions of its street with specified materials, or punish any one concerned for operating the cars of the company, where the paving was not done. Such later ordinance would be an interference with the contract between the city and the railway as contained in the ordinance granting the latter its franchise. *Ib.*
3. MUNICIPAL CORPORATION, CHIEF OFFICER OF: STATUTE. The chairman of the board of trustees of a town, incorporated under the General Statutes of 1865, chapter 41, page 239, is the chief officer of such town. *Cloud v. Inhabitants of Pierce City*, 357.
4. ———: SERVICE OF PROCESS: JUDGMENT BY DEFAULT. In order to support a judgment by default against a corporation, it must appear of record that the person, who the return of the officer shows, was served with process, has such a relation to the corporation that service on such person was tantamount to service on the corporation. *Ib.*
5. ———: ———. There are no statutory provisions in this state regulating the service of process upon cities or towns, and in the absence of such provisions, the manner of service still remains as at common law, and must be upon the mayor or other chief officer. *Ib.*
6. MUNICIPAL CORPORATION: MANDAMUS. Mandamus cannot issue against a municipal corporation until the claim on which it is based is first reduced into judgment; and this is necessarily so, where the mandamus proceedings are wholly based on Revised Statutes, section 2415, requiring that an execution against a city, etc., be first returned unsatisfied before mandamus can issue. *Ib.*
7. ST. LOUIS CITY: PUBLIC STREETS: WELLS. The city of St. Louis has the right to abolish wells situated within the limits of its public streets. *Ferrenbach v. Turner*, 416.
8. ———: WELLS: LICENSE, REVOCATION OF. The passage of an ordinance by the city, directing its street commissioner to fill up said

wells, operates as a revocation of any license, express or implied, to construct the wells in the streets. *Ib.*

9. ——— : ———. The city can abolish said wells at the public expense, and the persons who construct them are not entitled to compensation for their loss. *Ib.*
10. STREET IMPROVEMENTS : TAX-BILLS, AMENDMENT OF. It was competent for the city engineer of the city of St. Joseph, after making out tax bills for macadamizing, curbing and guttering two streets, on discovering that the block had been subdivided into lots, to correct and certify anew the bills, and he could so do, whether he was out of office or was holding the same as his own successor. *Morley v. Weakley*, 451.
11. ——— : ——— : PLEADING. Although the petition stated that each lot was charged for the work done in front of it, and that the engineer computed the cost of the work done "in front of and adjoining the lot," and not for the proportionate share of the cost of the whole work, yet, as in this connection, the cost is alleged to have been that which is chargeable to the whole lot, and that the amount assessed was the proportionate cost of the work under the act authorizing it, and which act is sufficiently referred to, the petition is sufficient. *Ib.*
12. ORDINANCES : MAYOR : CONTRACT. The city ordinances did not require the mayor to act separately in awarding the contract, but that he should act in conjunction with the city council, as its presiding officer. *Ib.*
13. STREET IMPROVEMENT : BIDS, ADVERTISEMENT FOR. It was not necessary that the advertisements for bids should state the amount of work to be done where they showed the streets between which and on which the work was to be done and stated the different classes of work. *Ib.*
14. ——— : SPECIFICATIONS : ORDINANCES. The ordinances, with respect to macadamizing, curbing and guttering, provide in detail as to the material and manner of doing this class of work, and the general ordinance, requiring a plan or profile of the work with specifications to be on file where bids are advertised for any public improvement, has no application. The latter ordinance should not be construed to require the city engineer to do that by specifications which is clearly stated in the ordinance. *Ib.*
15. ——— : LOST BID : EVIDENCE. Where a bid for macadamizing, etc., a street is lost, the loss being shown, parol evidence of its contents is admissible, and the fact that no record or an imperfect account of the bid was kept, will not prevent plaintiff from showing its true contents. *Ib.*

#### MURDER.

1. MURDER : INSTRUCTIONS. An instruction for murder in the second degree is properly refused where the evidence shows the offence to

be murder in the first degree, or nothing. *The State v. Collins*, 245.

2. CRIMINAL PRACTICE: MURDER: INSTRUCTION. On a trial for murder, an instruction is not erroneous which tells the jury that if they believe the defendants guilty of murder in the first or second degrees, but have a doubt as to which degree, they will give them the benefit of such doubt, and convict of the lesser degree. *The State v. Anderson*, 309.
3. CRIMINAL LAW: EVIDENCE. On the trial of one for murder, it is not competent for him to show by his statement, made at the time he purchased the pistol with which he killed the deceased, that his purpose in buying it was to kill mad dogs. *The State v. Holcomb*, 371.
4. ———: ———: MURDER. Although an attempted arrest by an officer is illegal, yet if he is killed in such attempt with express malice, the slayer will be guilty of murder in the first or second degree, and not manslaughter. *Ib.*
5. CRIMINAL LAW: MURDER: PRACTICE: INSTRUCTIONS. On a trial for murder, the court should not instruct for a grade of homicide not shown by the evidence. *The State v. Wilson*, 520.

#### NEGLIGENCE.

1. ———: PLEADING. A petition founded on the negligence of the master in failing to keep the machinery used by his servants in repair must allege that the master knew its condition, or, by the exercise of due care, might have known it. *Current v. The Missouri Pacific Railway Company*, 62.
2. ———: MACHINERY: HIDDEN DEFECTS. An employer is not liable for an injury to the servant occasioned by a hidden defect in machinery furnished for his use, unless the employer knew, or, by the exercise of reasonable care, could have discovered such defect. *Ib.*
3. NEGLIGENCE. Where, in an action founded on the negligence of defendant, plaintiff's evidence shows that his own negligence directly contributed to produce the injury, he disproves the case alleged, and cannot recover. *Milburn v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 104.
4. RAILROAD: KILLING STOCK: PUBLIC CROSSING. In an action against a railroad for the negligent killing of plaintiff's cows by its trains, on a public crossing mere proof that the speed of the trains was not checked, and that the cattle could have been seen eighty rods off, does not establish defendant's negligence. *Ib.*
5. ———: ———: NEGLIGENCE OF OWNER. Where the owner of cattle sees them in danger on a railroad track, and can, by reasonable exertion get them off, he is bound to do so, and if he does not, and they are injured by a passing train, he cannot recover. The owner,

in such case, has no right to rely upon the performance of the duty which the law imposes on the company of giving warning signals. *Ib.*

6. NEGLIGENCE : CARELESS DRIVING. WHEN OWNER OF CARRIAGE NOT RESPONSIBLE. One who gets into the carriage of another without his consent or knowledge, and is injured by the careless driving of the latter, while so ignorant of his presence in the carriage, cannot recover for the injury. *Siegrist v. Arnot*, 200.
7. ——— : PERSON IN DANGER. Where a person is placed in peril by the carelessness of another who owes him a duty of safely carrying him, the propriety of an attempt to escape a reasonably apprehended danger, is not to be determined by what a person of ordinary care and prudence would have done under the circumstances. *Ib.*
8. NEGLIGENCE : RAILROAD : SPEED OF TRAINS. A railroad has the right to run its trains in excess of the usual rate of speed to make up lost time, but, in doing so, those in charge of the train should use greater vigilance and care to prevent accidents to workmen on the track. *Stephens v. The Hannibal & St. Joseph Railway Company*, 221.
9. ——— : ——— : ———. Where an employe on the track is injured by a train so running at an unusual rate of speed, he cannot recover in the absence of evidence to show that the engineer did discover, or, by the exercise of care, could have discovered the plaintiff in time to have checked the train. *Ib.*
10. BANK DIRECTORS, NEGLIGENCE OF. The negligence of the directors of a bank, whereby they failed to discover the defalcation of the book-keeper, constitutes no defence to an action on the latter's bond. *Chew v. Ellingwood*, 260.
11. MASTER AND SERVANT : RISKS ASSUMED BY SERVANT : NEGLIGENCE. A servant assumes the ordinary and natural risks incident to the service in which he engages, and the master is not liable for the servant's want of care. *Renfro v. The Chicago, Rock Island & Pacific Railway Co.*, 302.
12. THE EVIDENCE in this case examined, and the accident, which resulted in the death of plaintiff's husband, who was in defendant's service, held to have been attributable to the risks incident to the business in which the deceased was engaged, coupled with the want of care on the part of himself and a fellow servant. *Ib.*
13. PARTNERSHIP : NEGLIGENCE, LIABILITY FOR. The defendants were sued as general partners, under the firm name and style of "The Hannibal Meat Company, Limited," for injuries resulting from the explosion of their steam boiler, while used by their employes. It was pleaded as a defence that the company was a joint stock company, organized under the laws of the state of Pennsylvania, and that, under said laws, the company, and not the defendants, as individuals, was liable to be sued for the injuries complained of. It

appeared, on the trial, that there had been a failure, on the part of defendants and their associates, to file their articles of association in the proper recorder's office, in the state of Pennsylvania, as required by the statute of said state, until after the occurrence of the injury sued for. *Held*, that the defendants were rightly sued as general partners. *Smith v. Warden*, 382.

14. RAILROAD : PASSENGER ALIGHTING FROM TRAIN : NEGLIGENCE. In an action against a railroad company by a passenger for injuries received in alighting from a train at the company's station, if the train did not stop a sufficient length of time to enable the plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was so started while plaintiff was in the act of alighting, whereby he was thrown down and injured, the company is liable for the injury. Affirming *Straus v. Kansas City, St. Joseph & Council Bluffs Railway Co.*, 75 Mo. 185. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railway Co.*, 421.
15. — : — : —. If the train was stopped a sufficient length of time for plaintiff to conveniently alight, and without any fault of defendant's servants, he failed to do so, and the conductor not knowing and not having reason to suspect that the plaintiff was in the act of alighting, caused the train to start while he was so alighting, the defendant would not be liable. *Ib.*
16. — : — : —. If a conductor has reason to believe that any passenger who has reached his destination, though dilatory, may be in the act of alighting, and he starts his train without examination, or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, the company will be liable. *Ib.*
17. — : ACTION FOR DEATH OF PERSON : CONTRIBUTORY NEGLIGENCE. One who recklessly or carelessly goes upon the track of a railroad company, without looking or listening for an approaching train, and is thereby killed, when, by looking or listening, he would have been apprised of the approach of the train, is guilty of such contributory negligence as to preclude a recovery in an action for his death, notwithstanding the train was, at the time, running at a rate of speed forbidden by an ordinance of the city in which the accident occurred, and also failed to ring its bell. *Taylor v. The Missouri Pacific Railway Co.*, 457.
18. CONTRIBUTORY NEGLIGENCE : DEMURRER TO EVIDENCE. The evidence of the plaintiff in this case, which was an action for injuries received from defendant's train, in attempting to cross a street in the city of St. Louis, *held*, not to warrant a demurrer to the evidence for defendant, on the ground that it showed that plaintiff had failed to look or listen before attempting to cross the track. *Drain v. The St. Louis, Iron Mountain & Southern Railway Company*, 574.
19. — : —. Where the evidence of plaintiff, relied on to show that he was guilty of contributory negligence, is vague, ambiguous and uncertain and does not clearly, or conclusively show such

negligence on his part, the case should not be taken from the jury. *Ib.*

20. CONTRIBUTORY NEGLIGENCE, NEGLIGENCE OF DEFENDANT AFTER DISCOVERY OF. Although one who is struck and killed by a train while standing on a railroad track is guilty of contributory negligence in so being in a place of peril and danger, yet the railroad will still be liable for the accident if its engineer discovered the danger of the deceased, and after such discovery, by the use of any means within his power consistent with the safety of the train, could have avoided the injury. *Bell v. The Hannibal & St. Joseph Railway Company*, 599.
21. PROXIMATE CAUSE. The failure of the engineer in such case to use the means possessed at the time and adequate to prevent the injury is the proximate cause of the accident. *Ib.*
22. THE PLEADINGS IN THIS CASE held to raise the question of the railroad's negligence after becoming aware of the danger of the deceased, and also, held that the evidence presented a proper question for the jury thereon. *Ib.*

*On re-hearing.*

23. UPON A REVIEW AND RECONSIDERATION of the whole case, held that the death of the deceased was occasioned directly and solely by his own gross carelessness in going and remaining upon the railroad track, without looking or listening for the approach of the train, and that there is no evidence in the record that the servants of defendant in charge of the engine and train could have avoided the injury after discovering the danger of the deceased, or that upon the discovery of his presence and peril upon the track they failed or omitted to use any means within their power to avoid and prevent the accident, and that, therefore, the demurrer to the evidence should have been sustained (Ray, J., dissenting). *Ib.*
24. MASTER AND SERVANT: MACHINERY: NEGLIGENCE. It is the duty of an employer to use reasonable and ordinary care and foresight in procuring appliances for the use of his servants, and in keeping the same in repair. But he is not required to furnish absolutely safe machinery, and what is reasonable and ordinary care depends upon the nature and character of the implement, and the danger to be encountered in its use. *Covey v. The Hannibal & St. Joseph Railway Company*, 635.
25. ———: ———: DAMAGES. The right of the servant to recover damages for injuries incurred in the use of defective machinery, depends upon proof that the injuries were so incurred, and that the master was aware of the defect, or that the use of reasonable care on his part would have disclosed the defect. *Ib.*
26. ———: AGENT, KNOWLEDGE OF. Knowledge of defects on the part of the agents of the employer, who are intrusted with the duty of procuring machinery and keeping the same in repair, is to be attributed to the employer. *Ib.*

- 27 ——— : DUTY OF SERVANT : LATENT DEFECTS. While the servant is not bound to search for latent defects, he must take notice of those which are open to his observation, and of which he has knowledge, and if, with such information, he continues to use the implement, he does so at his own risk, as to injuries arising from such known defects. *Ib.*
28. ——— : VICE PRINCIPAL. It is error to single out a servant upon whom none of the duties of the master, as to furnishing proper appliances and keeping the same in repair, devolve, and predicate a right to recover upon such servant's knowledge of defects, or his want of care. *Ib.*

NEW TRIAL.

1. PRACTICE : NEW TRIALS. There is no limit to the number of new trials the trial court may grant either party, where they are allowed on account of errors committed in giving or refusing instructions, or in admitting or excluding evidence. *The State ex rel. Albers et al. v. Horner*, 71.
2. ——— : ———. Nor is there any limit to the number of new trials which may be granted when the jury err in a matter of law, or where they are guilty of misbehavior. *R. S.*, sec. 3705. *Ib.*
3. ——— : REMARKS OF COUNSEL : NEW TRIAL. It is no ground for new trial that counsel in argument to the jury misrepresented the facts in evidence. It is for the jury, in such case, to apply the correction. *The State v. Zumbunson*, 111.

NOTICE.

1. TITLE TO LAND : UNRECORDED TITLE BOND : NOTICE. A purchaser of land for value, without notice of an unrecorded title bond, will take a clear title against any right growing out of such bond. *Anderson v. McPike*, 293.
2. EQUITY : PURCHASER WITH NOTICE UNDER PURCHASER WITHOUT NOTICE. A purchaser with notice, from a *bona fide* purchaser for a valuable consideration without notice, is entitled to the same protection in equity against one seeking to overturn his title as the purchaser without notice. *Ib.*
3. ——— : ——— : NOTICE. A railroad is not liable for an injury resulting from its crossing being out of repair, unless it had notice of such fact, or the defect existed a sufficient length of time to justify the presumption of notice. *Mann v. The Chicago, Rock Island & Pacific Railway Company*, 347.
4. PROCESS, CONSTRUCTIVE SERVICE OF : NOTICE. The doctrine of constructive service of process or notice is altogether the creature of statutory enactment, and has no existence, except where expressly declared by the law-making power. *Cloud v. Inhabitants of Pierce City*, 357.

5. NOTICE. One who claims title through a deed which recites that the land is subject to an encumbrance, will be held to have been put on inquiry as to the nature and amount of such encumbrance when he purchased. *Bronson v. Wanzer*, 408.
6. VENDOR'S LIEN. One who buys land subject to a vendor's lien, with notice of the same, takes it subject to such lien. *Ib.*

See SHERIFF'S DEED, 1.

#### NUISANCE.

1. PUBLIC NUISANCE : BAWDY HOUSE. A bawdy house is a public or common nuisance *per se*, but this is not the case when such house is authorized by law, and kept in accordance with its provisions. *Givens v. Van Studdiford*, 149.
2. ——— : ———. Where, in violation of the municipal ordinance regulating such house, the inmates so indecently expose or conduct themselves as to render the property of an adjoining proprietor undesirable, or unfit for use and occupancy by decent persons, it becomes a common nuisance. *Ib.*
3. LEASING PROPERTY FOR A BAWDY HOUSE : INJURY TO ADJOINING OWNER. To render the landlord responsible, in such case, to the adjoining owner for the depreciation in value of the latter's property, resulting from such alleged nuisance, it must appear that he leased the property for the purpose of, or knowing it would be used for a bawdy house, and that he assented to the indecent conduct of the inmates, or continued the leasing after knowledge of the fact. *Ib.*
4. PUBLIC NUISANCE, PRIVATE ACTION FOR. While, as a general rule, it is true that the law does not give a private action for a public wrong, an exception to this exists where a private person suffers some damage over and beyond the rest of the community by reason of a public nuisance. *Ib.*
5. ——— : SPECIAL DAMAGE. In a private action for injury resulting from a public nuisance, the special damage suffered by the plaintiff must be averred and proved. *Ib.*
6. MEASURE OF DAMAGES. The loss of rents is a proper element of damages in an action against the lessor of a bawdy house by the owner of adjoining property for injury resulting to the latter from the nuisance. *Ib.*
7. ———. The depreciation in the value of the property, it having been sold at a forced sale during the continuance of the nuisance, is also a proper element of damages. *Ib.*

## OFFICES AND OFFICERS.

1. ATTACHMENT : INTERPLEA : APPEAL : SUPERSEDEAS : EXECUTION, WHEN OFFICER NOT LIABLE FOR FAILURE TO LEVY. The pendency of the appeal of an interpleader from the judgment of a justice of the peace in an action of attachment, where bond is given by the interpleader, operates as a *supersedeas* in the cause, and prevents the sale of the attached property pending such appeal, and an officer is not liable in such case for failure to levy an execution issued against the property interpleaded. *The State ex rel. Boyington v. Ranson*, 327.
2. MUNICIPAL CORPORATION, CHIEF OFFICER OF: STATUTE. The chairman of the board of trustees of a town, incorporated under the General Statutes of 1865, chapter 41, page 239, is the chief officer of such town. *Cloud v. Inhabitants of Pierce City*, 357.
3. POLICEMAN: PROOF OF OFFICIAL CHARACTER. It is only necessary, in order to show that one was a policeman, in a city of the fourth class, to prove that he acted and was recognized as such officer. It is unnecessary to produce his official appointment as policeman. *The State v. Holcomb*, 371.
4. CITIES OF FOURTH CLASS: POLICEMAN: RIGHT TO MAKE ARRESTS. A policeman in cities of the fourth class, in the absence of an ordinance giving him the authority, has no right, without a warrant, to arrest a person for carrying concealed weapons. *Ib.*
5. ———: ———: MURDER. Although the attempted arrest by the officer in such case was illegal, yet if the defendant killed the deceased with express malice, it constituted murder in the first or second degree, and not manslaughter. *Ib.*

## OPINION.

See WARRANTY.

## ORDINANCE.

CITY ORDINANCE, WHEN MUST BE PLEADED. Where one asserts his right to recover upon a city ordinance, or seeks to justify an act done by him under such ordinance, he should plead it. *Givens v. Van Studiford*, 149.

See MUNICIPAL CORPORATIONS.

## PARTIES.

1. PARTIES. Under our statute, making all contracts joint and several, a separate action may be brought against one of several heirs to charge him on the bond of his ancestor where such heir holds his portion of the estate in severalty. *The State ex rel. Yeoman v. Hoshaw*, 193.

2. ——— : SUBSTITUTION OF : STATUTE. One who acquires the title of a purchaser at a sale under a deed of trust, may, under the statute (R. S., sec. 3671), be substituted as party-plaintiff, after the institution of an ejectment suit by such purchaser. *Cos v. Ritter*, 277.
3. PRACTICE : PARTIES : CONSIGNEE, RIGHT OF ACTION OF : RAILROAD : DAMAGES. The consignees of a car load of wheat screenings shipped over a company's railroad, but which was destroyed before reaching its destination, may maintain an action against the railroad company for the recovery of damages for such destruction. *Kirkpatrick v. The Kansas City, St. Joseph & Council Bluffs Railway Co.*, 341.
4. ——— : ——— : ——— : ———. Where the consignee of goods shipped upon a railroad pays the draft drawn on him by the shipper and receives the bill of lading to which the draft is attached, and subsequently purchases the goods from the owner, he thereby becomes the real party in interest under the code. R. S., sec. 3462. And it makes no difference that the goods were destroyed before the absolute sale, as the property of the owner in them still continued and was the subject of transfer, and the transferee could maintain action for damages for their destruction on the ground of such transfer. *Ib.*

See PRACTICE, CIVIL, 15.

#### PARTNERSHIP.

1. PARTNERSHIP : NEGLIGENCE, LIABILITY FOR. The defendants were sued as general partners, under the firm name and style of "The Hannibal Meat Company, Limited," for injuries resulting from the explosion of their steam boiler, while used by their employes. It was pleaded as a defence that the company was a joint stock company, organized under the laws of the state of Pennsylvania, and that, under said laws, the company, and not the defendants, as individuals, was liable to be sued for the injuries complained of. It appeared, on the trial, that there had been a failure, on the part of defendants, and their associates, to file their articles of association in the proper recorder's office, in the state of Pennsylvania, as required by the statute of said state, until after the occurrence of the injury sued for. *Held*, that the defendants were rightly sued as general partners. *Smith v. Warden*, 382.
2. LIMITED PARTNERSHIP. A full compliance with the laws of Pennsylvania, both as to the statements required to be made in the articles of association, and as to recording the same, was necessary and pre-requisite to the formation of the limited partnership in that state, and if the partners proceeded to do business before so complying with the law, they did so as general partners. *Ib.*
3. PARTNERSHIP : RECEIVER, POWER OF COURT TO APPOINT : JURISDICTION. The circuit court has original jurisdiction in all matters of equity, and has inherent power, independent of any statute authorizing it, to appoint a receiver in the settlement of partnership affairs, where there is no statute depriving it of such power. *Cox v. Volkert*, 505.

## PERSONAL PROPERTY.

1. PERSONAL PROPERTY: GIFT. Delivery of possession, either actual or constructive, is essential to a gift of corporeal personal property. *Doering v. Kenamore*, 588.
2. ———: ———. Where such property is in the adverse possession of another, there can be no delivery, and, hence, no gift. *Ib.*

## PERSONAL SERVICE.

1. PERSONAL SERVICE, CONTRACT FOR. When one enters into a contract of service for another for a fixed salary, or compensation, he, *prima facie*, agrees to give the latter his entire time, and the rendition of service by the employe, as a notary public in the employer's business, does not make the latter liable for the statutory fees therefor, in the absence of an agreement or understanding to that effect, or a course of conduct between the parties showing such fees were not to be included in the employe's salary. *Leach v. The Hannibal & Joseph Railroad Co.*, 27.
2. QUESTION FOR THE JURY. Whether such fees were included in the employe's salary is a question of fact for the jury to determine from the evidence, under proper instructions. *Ib.*
3. EVIDENCE. Receipts given by the employe to the employer, stating that the sums therein mentioned were in full for all demands for work done during regular and irregular hours, in the employer's service, are admissible in evidence in an action for such fees, and are *prima facie* evidence of payment as therein expressed, and such receipts are also competent evidence to show the capacity in which the employe acted, and the relation he sustained to the employer. *Ib.*
4. ———. It was also competent for defendant, on the trial of such cause, to show that the services of plaintiff, as notary, were performed during regular business hours, while he was in defendant's service. *Ib.*

## PLEADING.

1. ———: PLEADING. A petition founded on the negligence of the master in failing to keep the machinery used by his servants in repair must allege that the master knew its condition, or, by the exercise of due care, might have known it. *Gurrent v. The Missouri Pacific Railway Company*, 62.
2. CODE: PLEADING UNDER. Under the code there is but one form for a civil action, and the petition need only set out the facts constituting the cause of action, and this is the case whether such facts authorize legal or equitable relief. *Clark v. Clark*, 114.
3. CITY ORDINANCE, WHEN MUST BE PLEADED. Where one asserts

his right to recover upon a city ordinance, or seeks to justify an act done by him under such ordinance, he should plead it. *Givens v. Van Studdiford*, 149.

4. PLEADING: SPECIAL PLEA. The defence that the services sued for were contrary to public policy, should be pleaded. *Musser v. Adler*, 445.
5. ———: GENERAL DENIAL: SPECIAL PLEA. A general denial puts in issue the facts alleged in the petition, and not the liability arising therefrom. The facts, from which the law draws the conclusion of defendant's non-liability, must be specially pleaded in the answer when they are not stated in the petition. *Ib.*
6. ———: ———: PLEADING. Although a petition stated that each lot was charged for the work done in front of it, and that the engineer computed the cost of the work done "in front of and adjoining the lot," and not for the proportionate share of the cost of the whole work, yet, as in this connection, the cost is alleged to have been that which is chargeable to the whole lot, and that the amount assessed was the proportionate cost of the work under the act authorizing it, and which act is sufficiently referred to, the petition is sufficient. *Morley v. Weakley*, 451.
7. CODE PLEADING: DIFFERENT CAUSES OF ACTION, JOINDER OF. Under the code, each cause of action must be separately stated with the relief sought, yet the same cause of action may be stated in different ways in different counts. *The St. Louis Gas Light Company v. The City of St. Louis*, 495.
8. ———. Where allegations are once clearly made which are common to all the counts, it is sufficient as to such allegations to make reference to them in the subsequent counts. *Ib.*
9. PLEADING, EFFECT OF. The fact that defendant may plead the legal effect of an instrument differently from the plaintiff, does not deny its execution. *Cox v. Volkert*, 505.

#### PLEADING, CRIMINAL.

1. CRIMINAL LAW: FORGERY IN SECOND DEGREE: INDICTMENT. An indictment for forgery in the second degree, under Revised Statutes, section 1406, examined and approved. *The State v. Yerger*, 33.
2. ———: ———: ———. In an indictment for forgery, it is not necessary to expressly allege that the name charged to have been forged was affixed to the forged instrument, when the latter is set forth according to its tenor, and shows such to be the fact. *Ib.*
3. ———: FORGERY: TENOR: PURPORT. Where the tenor of the forged instrument is exact, and complete, and sufficiently gives the purport, the purporting clause may be rejected as surplusage. *Ib.*
4. FORGERY: INDICTMENT: INTENT. It is not necessary to the validity

of an indictment for forgery that it should charge an intent on the part of the defendant to defraud any particular person. *Ib.*

5. ——— : ——— : INDICTMENT. It is not necessary in an indictment for forging a check, to set out the indorsement thereon, as that is not charged to be forged, and has nothing to do with the forged instrument. *Ib.*
6. INDICTMENT: FELONIOUS ASSAULT. An indictment under Revised Statutes, section 1263, charging that defendant assaulted another by pointing a gun at the latter with the intent to maim and kill him, is not defective in only alleging that the gun was loaded with gunpowder. Serious injury can be inflicted with a gun so loaded. *The State v. Sears*, 169.
7. CRIMINAL LAW: PLEADING: PRACTICE: EVIDENCE. An indictment for felonious assault, under Revised Statutes, section 1262, and a series of instructions applicable to that offence approved, and the evidence in the case held sufficient to sustain a conviction. *The State v. Jones*, 623.

#### POLICEMAN.

1. POLICEMAN: PROOF OF OFFICIAL CHARACTER. It is only necessary, in order to show that one was a policeman, in a city of the fourth class, to prove that he acted and was recognized as such officer. It is unnecessary to produce his official appointment as policeman. *The State v. Holcomb*, 371.
2. CITIES OF FOURTH CLASS: POLICEMAN: RIGHT TO MAKE ARRESTS. A policeman in cities of the fourth class, in the absence of an ordinance giving him the authority, has no right, without a warrant, to arrest a person for carrying concealed weapons. *Ib.*
3. ——— : ——— : MURDER. Although the attempted arrest by the officer in such case was illegal, yet if the defendant killed the deceased with express malice, it constituted murder in the first or second degree, and not manslaughter. *Ib.*

#### POSSESSION.

1. LAND, PURCHASE OF: POSSESSION: VENDOR AND VENDEE. Where the vendor of land, at the time of contracting, refuses to put the vendees in possession, and the conveyance is accepted on such terms, it is not the vendor's duty to put the vendees in possession. *Anderson v. McPike*, 293.
2. LANDLORD AND TENANT: ATTORNMENT: POSSESSION: PURCHASER UNDER TRUST DEED. The purchaser of land at a trustee's sale, made at the request of the administrator of the beneficiary, acquires all the title of the mortgageor and the beneficiaries under the trust deed, and as against them is entitled to the possession; and a tenant, holding under authority of the administrator's lessee, who attorns to the purchaser, becomes the latter's tenant, and thereafter the

tenant's possession is the possession of the purchaser. *Lindenbower v. Bentley*, 515.

3. TRESPASS: POSSESSION. Possession of real estate is a pre-requisite to an action for trespass, and one who is not in possession cannot maintain the action. *Ib.*
4. ———: ———: LANDLORD AND TENANT. A tenant to whom land is rented is entitled to its exclusive possession, and being in exclusive possession, the landlord out of possession cannot maintain trespass. *Ib.*
5. POSSESSION OF TENANT: SECOND LEASE. The possession of a tenant is the possession of his lessor, and the fact that the parties claiming the adverse title without the knowledge of such lessor prevailed on tenant, while so in possession under the first lease, to accept a lease from them, cannot affect the possession of such first lessor. *Farrar v. Heinrich*, 521.
6. ———: ———. The fact that the second lessors may have made their lease under the mistaken belief that the tenant was a squatter and in ignorance of the existence of the first lease, cannot affect the rights of the first lessor. *Ib.*
7. ———: ———. If neither party in fact knew, nor had reason to suspect the existence of the lease by the other, and although both acted in good faith in making their respective leases, still such facts cannot help the second lessor. In such circumstances the familiar doctrine and duty of the court is not to interfere, but to leave the parties as it found them. *Ib.*

See LARCENY, 1.

#### PRACTICE, CIVIL.

1. DEATH OF WIDOW PENDING SUIT: REVIVAL IN NAME OF ADMINISTRATOR: EJECTMENT: DAMAGES. Where the widow dies pending an action of ejectment by her for the recovery of possession of the mansion house and messuages, the suit may be revived in the name of her administrator, and recovery had for rents and profits, by way of damages, to the time of her death. *Roberts v. Nelson*, 21.
2. EJECTMENT: DAMAGES: STATUTE. The statute with respect to ejectment suits, contemplates that damages may be declared for in the same suit, and in the same count. *Ib.*
3. INSTRUCTION. An instruction should not be given where there is no evidence to authorize it. *Brown v. The Covenant Mutual Life Insurance Company*, 51.
4. MASTER AND SERVANT: MACHINERY: PRACTICE. In an action for an injury to a servant, resulting from the negligence of the master in furnishing him with defectively constructed machinery to use in

his work, the servant cannot recover on the ground that the master failed to keep his machinery in repair. *Current v. The Missouri Pacific Railway Company*, 62.

5. PRACTICE: NEW TRIALS. There is no limit to the number of new trials the trial court may grant either party, where they are allowed on account of errors committed in giving or refusing instructions, or in admitting or excluding evidence. *The State ex rel. Albers et al. v. Horner*, 71.
6. ———: ———. Nor is there any limit to the number of new trials which may be granted when the jury err in a matter of law, or where they are guilty of misbehavior. R. S., sec. 3705. *Ib.*
7. JURISDICTION: PROCESS: PRACTICE. Where an original petition states a cause of action against individuals, as constituting a co-partnership, and the amended petition states one against a corporation, the latter, before the court can have jurisdiction to render judgment, must be in court on voluntary appearance, or be brought in by service of process, and this is the case although the firm name was the same as that of the corporation, and the stockholders in the latter composed said firm. *Thompson v. Allen*, 85.
8. NEGLIGENCE. Where, in an action founded on the negligence of defendant, plaintiff's evidence shows that his own negligence directly contributed to produce the injury, he disproves the case alleged, and cannot recover. *Milburn v. The Kansas City, St. Joseph & Council Bluffs Railway Company*, 104.
9. BILL OF EXCEPTIONS: MOTION FOR NEW TRIAL. A bill of exceptions is properly made up at the term of the court at which the motion for a new trial is overruled. And it is immaterial that such motion was overruled at the third term after it was filed without being continued from term to term by any special or general order of court. *Givens v. Van Studdiford*, 149.
10. CITY ORDINANCE, WHEN MUST BE PLEADED. Where one asserts his right to recover upon a city ordinance, or seeks to justify an act done by him under such ordinance, he should plead it. *Ib.*
11. JUDGMENT, REVERSAL OF. Where a judgment is reversed with the usual mandate to restore the parties to the same condition in which they were before its rendition, it becomes mere waste paper, and the parties are allowed to proceed in the trial court to obtain a final determination of their rights in the same manner and to the same extent as if the cause had not been decided in the trial court. Neither party in the subsequent prosecution of the cause can suffer detriment or receive assistance from the former adjudication. *Crispen v. Hannovan*, 160.
12. THE JUDGMENT OF THE CIRCUIT COURT, reversing that of the probate court, for errors committed by the latter court in the admission of evidence, affirmed. *Coombs v. Coombs*, 176.
13. PARTIES. Under our statute, making all contracts joint and

several, a separate action may be brought against one of several heirs to charge him on the bond of his ancestor where such heir holds his portion of the estate in severalty, *The State ex rel. Yeoman v. Hoshaw*, 193.

14. PRACTICE: FINDING OF JURY. Where the instructions properly present the matters in issue to the jury, their verdict must be regarded as final. *Ingle v. Mudd*, 216.
15. ———: PARTIES: ENFORCEMENT OF MECHANIC'S LIEN. Where, in a proceeding to enforce a mechanic's lien, the trustee and beneficiary in a prior deed of trust are not made parties, the judgment will have no force or effect as to the beneficiary in, or purchaser under, the deed of trust, and the purchaser, at a sale upon the mechanic's lien, will only acquire the equity of redemption, and the right to the premises after the trust lien has been paid. *Coe v. Ritter*, 277.
16. ———: PRACTICE: INSTRUCTIONS. In the trial of an action for damages for fraudulent representations touching the financial condition of a person, the jury should not be left to conjecture as to what are material false statements. *Anderson v. McPike*, 293.
17. ———: TRANSCRIPT OF BILL OF EXCEPTIONS. The clerk of the trial court in making a transcript of the bill of exceptions cannot insert instructions not contained in nor called for by such bill. *The State v. Anderson*, 309.
18. ———: PARTIES: CONSIGNEE, RIGHT OF ACTION OF: RAILROAD: DAMAGES. The consignee of a car load of wheat screenings, shipped over a company's railroad, but which was destroyed before reaching its destination, may maintain an action against the railroad company for the recovery of damages for such destruction. *Kirkpatrick v. The Kansas City, St. Joseph & Council Bluffs Railway Co.*, 341.
19. ———: ———: ———: ———. Where the consignee of goods shipped upon a railroad pays the draft drawn on him by the shipper and receives the bill of lading to which the draft is attached, and subsequently purchases the goods from the owner, he thereby becomes the real party in interest under the code. R. S., sec. 3469. And it makes no difference that the goods were destroyed before the absolute sale, as the property of the owner in them still continued and was the subject of transfer, and the transferee could maintain action for damages for their destruction on the ground of such transfer. *Ib.*
20. SEVERAL CAUSES OF ACTION. Injuries caused by the explosion of a boiler, to furniture of the husband, and to his wife's person, are distinct, and afford grounds for different causes of action. *Smith v. Warden*, 382.
21. HUSBAND AND WIFE: PRACTICE: RECEIPT. A receipt, by the husband, acknowledging satisfaction for the injury to the furniture, and for the payment by him of physicians' bills incurred by reason

of the injuries to his wife, and for the expenses of a truss for her, is no bar to an action for the injuries to the wife's person. *Ib.*

22. **EQUITABLE ACTION : PRACTICE : JURY.** A suit to subject land to the enforcement of a vendor's lien being an equitable one is properly triable by the court and a jury cannot be demanded therein as a matter of right. *Bronson v. Wanzer*, 408.
23. ——— : ——— : ———. The court, however, in such suit, may, in its discretion, take the opinion of the jury upon a specific question of fact by an issue made up for the purpose, but it is not bound by the finding of the jury and may adopt or reject the same as it may deem proper. *Ib.*
24. **PRACTICE : REMARKS OF COUNSEL : DISCRETION OF TRIAL COURT.** It is for the trial court to determine whether counsel in the conduct of a case, and in argument to the jury, transcend the limits of professional duty and propriety. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railway Co.*, 421.
25. ——— : ——— : **PROVINCE OF JURY.** Where counsel cannot agree as to the evidence in a cause, or mis-state the evidence, in argument, to the jury, it is the peculiar province of the jury, and not of the court, to determine what the evidence was. *Ib.*
26. ——— : **EVIDENCE : OPINION OF WITNESS.** It is not reversible error for a non-expert witness, who testifies to the facts in a case, to give an opinion based upon such facts. *Ib.*
27. ——— : **INSTRUCTION.** A party cannot complain of an instruction given at his own request. *Musser v. Adler*, 445,
28. **INSTRUCTIONS : COMMENTING ON EVIDENCE.** While an instruction should not comment on the evidence, nor single out one or more facts and give them undue prominence, yet an instruction in an action for the recovery of the value of services rendered as an attorney, is not so objectionable, which tells the jury that in considering the value of the plaintiff's services they should take into consideration the magnitude of the cases in which they were rendered, the skill required to perform the same so far as possessed by plaintiff ; the time required in the trial and preparation of the causes, and all the facts and circumstances touching the services so rendered. *Ib.*
29. **CHAMPERTY.** Unless the plaintiff's title, by which he seeks to enforce a right, is infected with a champertous agreement, he may proceed with his suit, and this is the case although such illegal contract may exist between the plaintiff and his attorney. A party will not be turned out of court because of a champertous contract, until he asks the aid of the court to enforce it. *Bent v. Priest*, 475.
30. **PRACTICE : JURISDICTION : APPEAL.** The circuit court does not, by granting an appeal, lose jurisdiction in a cause, and a bill of ex-

ceptions may be filed and acted upon after appeal granted. *Shaw v. Shaw*, 594.

31. ——— : WEIGHT OF EVIDENCE : DEMURRER. It is not the province of the court to determine the weight of the evidence, and where it is conflicting, a demurrer to the evidence, and instructions of a like character, are properly refused. *Covey v. Hannibal & St. Joseph Railway Company*, 635.
32. QUESTION OF LAW : JURY : PRACTICE. Whether an instrument purporting to be an acknowledgment of a debt is sufficient to take it out of the bar of the statute of limitations, is a question for the court, and whether the debt sued for is the one acknowledged, is a question for the jury. *Mastin v. Branham*, 643.
33. BANKRUPTCY : ASSIGNEE, POWERS OF : PRACTICE. An assignee in bankruptcy becomes entitled to the property of the bankrupt fraudulently conveyed, concealed, or inadvertently omitted, as well as that scheduled and surrendered; he acquires the title thereto by virtue of the proceedings in bankruptcy, and the deed of assignment, and is the proper party to sue for and recover the same. *Peery v. Carnes*, 652.
34. ——— : ——— : PRACTICE : TRUSTEE. So long as the proceedings in bankruptcy are pending, the assignee is the only proper person to sue, and the creditors are bound to assert their rights as such by and through the assignee, who is a trustee for the creditors and the bankrupt, with power to collect the assets and convert the assigned property into money and distribute it among the creditors. When this is done and the proceedings are brought to an end, his trust ceases, and whatever is left in his hands becomes the property of the bankrupt by operation of law, without any formal discharge of the assignee or re-transfer. *Ib.*
35. ——— : PRACTICE : BANKRUPT. After the assignee's trust has ceased, and the bankrupt has been discharged, the latter is the proper party to sue for demands due himself, at the time he was adjudged a bankrupt. *Ib.*
36. RAILROAD : RECEIVER, ACTION AGAINST : CONTRACT. An action can be brought in a state court against a receiver of a railroad by permission of the United States court which appointed him, for the breach of a contract for the purchase of ties, made by the railroad before the appointment of the receiver. *Harding v. Nettleton*, 658.
37. RECEIVER : JUDGMENT. The judgment of the state court cannot be enforced against the property of the corporation in the hands of the receiver, but must be presented to the United States court for allowance, and the latter court will determine the manner and time of paying it out of the assets of the road. *Ib.*
38. JUSTICE OF PEACE, APPEAL FROM : DISMISSAL OF SUIT. Where, on an appeal from a justice of the peace, the transcript shows that the justice acquired jurisdiction of the defendant, it having filed its

motion to set aside the judgment by default, a motion in the circuit court to dismiss the suit because of service of summons in the wrong township, should not be sustained. *Kelly v. The Chicago, Rock Island & Pacific Railway Company*, 681.

39. ——— : ———. The circuit court should have proceeded under Revised Statutes, section 3052, to try the case *de novo*. *Ib*.
40. ACTIONS EX DELICTO : JURISDICTION. In actions *ex delicto* the damages claimed in the petition determine the jurisdiction of the court, and if the plaintiff recover any damages he shall recover his costs. R. S., sec. 995. *Vineyard v. Lynch*, 634.
41. ——— : ———. The test of jurisdiction in actions *ex delicto* is the aggregate amount of damages prayed for, and not the amount of damages prayed for in a single count. And this is true, whether the action be for a wrong in the nature of a tort or otherwise. *Ib*.
42. ——— : SEVERAL COUNTS : COSTS. In an action *ex delicto*, where the petition contains several counts, if the plaintiff recover any damages upon any count, the costs shall not be adjudged against him. R. S., sec. 995. *Ib*.

See MANDAMUS, 2.

PERSONAL SERVICE, 2.

PRACTICE, CRIMINAL.

1. PRACTICE, CRIMINAL : PRESENCE OF DEFENDANT IN COURT DURING TRIAL. When the record in the appellate court shows that the defendant in a criminal cause was present at the commencement, or any other stage of the trial, it will be presumed, in the absence of evidence in the record to the contrary, that he was present during the whole trial. R. S., sec. 1891. *The State v. Yerger*, 33.
2. PRACTICE : REMARKS OF COUNSEL : NEW TRIAL. It is no ground for new trial that counsel in argument to the jury misrepresented the facts in evidence. It is for the jury, in such case, to apply the correction. *The State v. Zumbunson*, 111.
3. ——— : ———. Neither language of invective, by counsel, when called forth by the character of the crime, which the evidence tends to disclose, nor urgent appeals to the triers of the facts to do their duty, will justify the Supreme Court in reversing a judgment. *Ib*.
4. CRIMINAL PRACTICE : ASSESSMENT OF PUNISHMENT. Where the jury assess the punishment below the legal limit allowed by law for the offence of which they find defendant guilty, it is the duty of the court to sentence the defendant according to the lowest limit prescribed by law in such case. *The State v. Sears*, 169.

5. **INDICTMENT: PROSECUTOR.** Where an indictment is for a felony, the name of the prosecutor is not required to be endorsed thereon, although under the indictment the defendant may be convicted of an offence which is only a misdemeanor. *Ib.*
6. **PRACTICE, CRIMINAL: JURORS, PANEL OF.** The fact that in a trial for murder, a panel of forty qualified jurors was procured on the sixth, when the cause was not to be tried until the tenth, constitutes no error, as the defendant or his counsel could have re-examined them on the tenth, if he had so desired, to ascertain whether any of them had become disqualified between the dates mentioned. *The State v. Collins*, 245.
7. ———: **SEPARATION OF JURY.** The temporary separation of a juror from his fellows, the juror being under the charge of an officer while the others remained locked in their room, and nothing being said to such juror about the trial, constitutes no ground for a reversal of the judgment. *Ib.*
8. ———: **JURORS: OBJECTION TO PANEL AFTER VERDICT.** It is too late after verdict to object to the panel of jurors, or to the manner of its selection. *Ib.*
9. ———: **INSTRUCTIONS.** An instruction for murder in the second degree is properly refused where the evidence shows the offence to be murder in the first degree, or nothing. *Ib.*
10. **CRIMINAL PRACTICE: MURDER: INSTRUCTION.** On a trial for murder, an instruction is not erroneous which tells the jury that if they believe the defendants guilty of murder in the first or second degrees, but have a doubt as to which degree, they will give them the benefit of such doubt, and convict of the lesser degree. *The State v. Anderson*, 309.
11. ———: **INSTRUCTION.** An instruction held not erroneous because it did not confine the belief of the jury to the evidence, they having been sworn to try the case on the evidence, and it appearing they could not possibly have supposed they were permitted by the instruction to base their verdict upon anything but the testimony in the case. *Ib.*
12. ———: **DEFENDANT TESTIFYING.** A defendant who has testified is entitled to have instructions predicated on the facts sworn to by him just as if he were a disinterested witness. *Ib.*
13. ———: **TRANSCRIPT OF BILL OF EXCEPTIONS.** The clerk of the trial court in making a transcript of the bill of exceptions cannot insert instructions not contained in nor called for by such bill. *Ib.*
14. **CRIMINAL PRACTICE: GRAND JUROR, CHALLENGE OF.** The challenge of a grand juror can be made only on the ground that the juror is the prosecutor or complainant, or a witness on the part of the prosecution. R. S., secs., 1772, 1773. *The State v. Holcomb*, 371.

15. ——— : CHANGE OF VENUE. The finding of the trial court in a criminal case, on the question of the prejudice of the inhabitants of the county, on the hearing of an application for a change of venue, will not be interfered with by the Supreme Court, unless palpable injustice has been done the defendant. *Ib.*
16. CRIMINAL LAW : MURDER : PRACTICE : INSTRUCTIONS. On a trial for murder, the court should not instruct for a grade of homicide not shown by the evidence. *The State v. Wilson*, 520.
17. ——— : PRACTICE : INSTRUCTIONS. In a prosecution for felonious assault, under Revised Statutes, section 1262, where the evidence shows that grade of offence, it is not error to refuse to instruct that the defendant may be awarded a less degree of punishment than imprisonment in the penitentiary. *The State v. Jones*, 623.

## PRACTICE IN SUPREME COURT.

1. ——— : PRACTICE. Neither language of invective, by counsel, when called forth by the character of the crime, which the evidence tends to disclose, nor urgent appeals to the triers of the facts to do their duty, will justify the Supreme Court in reversing a judgment. *The State v. Zumbunson*, 111.
2. ——— : JUDGMENT AGAINST A MARRIED WOMAN. Where a judgment is erroneously rendered against a married woman, the Supreme Court can amend the same by striking out her name. *Crispen v. Hannovan*, 160.
3. ———. Excess in amount of a judgment may be obviated by a *re-mittitur* in the Supreme Court. *Buse v. Russell*, 209.
4. ———. The Supreme Court will only review the record proper in a cause, where it fails to appear that any exceptions were taken to the action of the trial court in overruling the motions for new trial and in arrest of judgment. *The State ex rel. Dopkins v. Hitchcock*, 231.
5. ——— : CERTIORARI. A transcript certified to the Supreme Court in return to a writ of *certiorari*, supersedes the one previously filed, and the latter cannot be regarded in determining the cause. *The State v. Anderson*, 309.
6. ——— : BILL OF EXCEPTIONS : INSTRUCTIONS. The Supreme Court will not presume that proper instructions were given by the trial court for the defendant, where the bill of exceptions only discloses that instructions were given for the state, and that others were asked for by defendant and refused. *Ib.*
7. ——— : WEIGHT OF EVIDENCE. The Supreme Court will not pass upon the weight of the evidence, nor determine its credibility and value where it is conflicting, but will defer to the conclusions and findings of the trial court having the witnesses before it. *Anderson v. Griffith*, 549.

8. ——— : APPEAL. An appeal to the Supreme Court, which is not taken at the term final judgment is rendered, will be stricken from the docket. *The State v. Rhodes*, 635.

## PRESUMPTION.

1. EXECUTION, RETURN OF : PRESUMPTION. A return of a sheriff to an execution will be presumed to have been deposited with the clerk of the court on the return day, in the absence of anything to the contrary in such return or on the writ. *Marks v. Hardy*, 232.
2. ——— : BURDEN OF PROOF : PRESUMPTION. If a party who has the means of information at hand makes the assertion that he relied on the statement of another, the burden is on him to establish the statement. For the law presumes that he who can see for himself, if he will but look, does look and finds out for himself, and if he asserts the contrary, he cannot prevail without overcoming the presumption thus arising. *Anderson v. McPike*, 293.
3. FRAUDULENT REPRESENTATION : KNOWLEDGE OF PERSON MAKING : PRESUMPTION. Fraud is not established and relief will not in general be granted without proof that the party who made the false representation knew at the time it was false. The law raises no presumption of knowledge from the mere fact that the representation is false. *Ib.*
4. ADMISSIONS IN PLEADINGS : EVIDENCE : PRESUMPTION, REBUTAL OF. *Prima facie* the original answer of a defendant in a cause is competent evidence against him. But the testimony of the attorney, whose name is signed to the answer, that defendant did not employ him in the cause, is sufficient to overthrow the presumption arising from his name being signed as defendant's attorney and to exclude the answer as evidence. *Ib.*
5. CONSTITUTIONAL LAW : CONSTRUCTION : PRESUMPTION. Acts of the legislature are presumed to be constitutional, and it is only where they manifestly infringe on some provision of the constitution that they can be declared void for that reason. In case of doubt, every possible presumption, not directly inconsistent with the language and subject, is to be made in favor of the constitutionality of the act. *Phillips v. The Missouri Pacific Railway Company*, 540.

## PRINCIPAL AND AGENT.

1. CORPORATION, NOTE OF : ACTS OF AGENTS. The authority of a corporation, or its officers, to issue its promissory note, need not be expressly given by its by-laws, or by formal resolution of the board of directors. Such authority can be inferred from the acquiescence of the corporation in, or the recognition by it of, the acts of its accredited officers in the regular course of its authorized business. *First National Bank of Hannibal v. North Missouri Coal & Mining Company*, 125.

2. **PRINCIPAL AND AGENT: SALE OF LAND: CONTRACT.** The owner of real estate situated in Kansas City, in this state, wrote from Chicago, Illinois, where he resided, to his agent, at Kansas City, in terms as follows: "Your letter received last night; I will leave the sale of the lots pretty much with you; if the party, or any one, is willing to pay sixty dollars per foot, one-third cash and balance one and two years, interest seven per cent. per annum, and pay commission of sale, I think I am willing to have you make out a deed and I will perfect it; I think you have the deeds to those lots, have you not? If you think better to try spring market, hold till then; the party buying may want the abstract in full, which I believe I have at Rockford, and will sell much less than cost. The above price is only for the present. \* \* \* It is understood that if I pay the taxes now due, that hereafter I am relieved from any taxes." *Held*, that the letter authorized the agent to make a contract for the present sale of the lots. *Smith v. Allen*, 178.
3. ———: ———. Where such agent has the power to sell, he has the authority to sign an agreement in his principal's name and to bind him thereby. *Ib.*
4. **AGENTS AND TRUSTEES: PROFITS MADE IN BUSINESS OF PRINCIPAL.** An agent or trustee cannot unite in himself the opposite character of buyer and seller, and if he does so, the profits made by him may be charged with a trust for the benefit of the principal, unless the latter confirm the transaction with full knowledge of all the facts. So, too, if the agent make gains from the use of the trust funds or property, he must account therefor, and if the agent accept any benefits in conducting the business of his principal, he will hold them in trust for the latter. *Bent v. Priest*, 475.
5. **DIRECTORS OF CORPORATION: AGENTS AND TRUSTEES.** The directors of a corporation are trustees and agents of it and the stockholders, and, in general, are governed by the same rules as are applied to trustees and agents. *Ib.*
6. ———: **AGENT, KNOWLEDGE OF.** Knowledge of defects on the part of the agents of the employer, who are intrusted with the duty of procuring machinery and keeping the same in repair, is to be attributed to the employer. *Covey v. The Hannibal & St. Joseph Railroad Company*, 635.

#### PRINCIPAL AND SURETY.

1. **BANKRUPT: DISCHARGE OF SURETY.** C filed his voluntary petition to be adjudged a bankrupt, in May, 1878, and in November following, his wife proved up against his estate a note, which he had executed to her with defendant as surety thereon, and the wife thereafter assented to the final discharge of the bankrupt. *Held*, that, as the note was executed prior to January 1, 1869, such consent of the wife was unnecessary, and was, therefore, inoperative and did not discharge the surety. *Clark v. Clark*, 114.
2. ———: **SURETY.** Where the husband receives money from the wife and executes to her therefor his note, with another as surety

thereon., the transaction of itself shows that the money was not intended as a gift, and creates a valid obligation on the part of the husband to pay the note, which the wife can enforce against both him and the surety. *Ib.*

3. **GUARDIAN AND WARD: FINAL SETTLEMENT: SURETIES.** The judgment for the ward against the guardian on the final settlement is conclusive on the sureties on his bond, as it is likewise conclusive for them against the ward. *The State ex rel. Yeoman v. Hoshaw*, 193.
4. **SURETY, PAYMENT OF JUDGMENT BY.** While the payment of a judgment by a surety would, at law, extinguish the debt, and the surety could maintain his action of *assumpsit* for the amount paid the rule is otherwise in equity. In the latter forum the surety is entitled to be subrogated to all the securities held by the creditor, has a right to be put in his place and to that end, although the judgment is against both the principal and surety, he may, for his exoneration be subrogated to the judgment itself, and thus have the benefit of its lien and the priority it gave the creditor. *Ferguson's Administrator v. Carson's Administrator*, 673.
5. **ADMINISTRATION: DEBT AGAINST ESTATE: SURETY.** In the defence of an action commenced in the lifetime of the deceased for a debt then in existence, his administrator gave an appeal bond, and one F became surety for the estate thereon. Subsequently, F, as such surety, paid the judgment, and took an assignment of the same and presented his demand therefor against the estate. *Held*, that when the surety paid the debt it did not lose its character of a debt against the estate, and, therefore, was not within the rule prohibiting the allowance of any claim against the estate not in existence at the time of the death of the deceased. *Ib.*

#### PRIORITY.

- : —: **PRIORITY.** The creditor of a corporation can gain no priority by filing his motion for execution against a stockholder before the return day of the execution against the corporation. *Marks v. Hardy*, 232.

#### PROBATE COURT.

1. **PROBATE COURT: APPEAL.** An appeal lies, under Revised Statutes, section 292, from the refusal of the probate court to make a preliminary order of publication for the sale of real estate to pay debts of the estate. *Ferguson's Adm'r v. Carson's Adm'r*, 673.
2. —: **SALE OF REALTY TO PAY DEBTS.** When the petition for the sale of the real estate, and the accompanying lists and schedules are formal and regular, and the case thus made shows a proper cause for an order of sale, it is the duty of the court to make the order of publication. The law does not contemplate an investigation of the accounts, and an inquiry as to whether there is a deficiency of personal property, until after the proof of the order of publication, and all interested persons are thereby before the court. *Ib.*

## PROCESS.

1. JURISDICTION: PROCESS: PRACTICE. Where an original petition states a cause of action against individuals, as constituting a co-partnership, and the amended petition states one against a corporation, the latter, before the court can have jurisdiction to render judgment, must be in court on voluntary appearance, or be brought in by service of process, and this is the case, although the firm name was the same as that of the corporation, and the stockholders in the latter composed said firm. *Thompson v. Allen*, 85.
2. ———: SERVICE OF PROCESS: JUDGMENT BY DEFAULT. In order to support a judgment by default against a corporation, it must appear of record that the person, who, the return of the officer shows, was served with process, has such a relation to the corporation that service on such person was tantamount to service on the corporation. *Cloud v. Inhabitants of Pierce City*, 357.
3. ———: ———. There are no statutory provisions in this state regulating the service of process upon cities or towns, and in the absence of such provisions, the manner of service still remains as at common law, and must be upon the mayor or other chief officer. *Ib.*
4. STATUTORY CONSTRUCTION: GENERAL STATUTES, 1865, CHAPTER 62. Chapter sixty-two, of the General Statutes of 1865, relates only to private corporations, and has no application to municipal corporations, and section thirty-four of this chapter does not relate to mesne, but only to final process. *Ib.*
5. PROCESS, CONSTRUCTIVE SERVICE OF: NOTICE. The doctrine of constructive service of process or notice is altogether the creature of statutory enactment, and has no existence, except where expressly declared by the law-making power. *Ib.*
6. JUDGMENT WITHOUT PROCESS. Where a party has not been brought into court by service of any process, a judgment rendered against him is *coram non judice* and void. *Ib.*
7. PROCESS, JURISDICTIONAL RECITAL OF IN RECORD, CONTRADICTION OF. Although the record contains the jurisdictional recital that "defendants have been duly served with process," it is competent to overthrow such recital by showing, by other parts of the record of equal dignity and importing equal verity, that such recital is untrue. And the return of the sheriff is a part of the record itself, and may, when radically defective, be used to rebut the presumption arising from recitals of service contained in other portions of the record. *Ib.*
8. JURISDICTION: PROCESS: JUDGMENT. Generally, the recital of jurisdiction or of service of process contained in the judgment will be construed in connection with the whole record, and will be deemed to refer to the kind of service shown by the other parts of the record. *Ib.*

9. ———: ———: ———. Where judgment has been rendered against a defendant corporation upon insufficient process, and the successor of such corporation appears in court and moves, for that reason, to set aside the judgment and asks leave to plead to plaintiff's petition, which is denied, such action does not, by relation, give jurisdiction where none existed before, nor confer on the judgment rendered a retrospective validity. *Ib.*

## PURPORT.

See FORGERY, 3

## PROMISSORY NOTES.

See BILLS AND NOTES.

## PROXIMATE CAUSE

See NEGLIGENCE, 21.

## RAILROADS.

1. RAILROAD: HIGHWAYS. It is the duty of a railroad company, without a statutory requirement to that effect, to so construct its road as not to prevent the public from using its highways, and this duty is a continuing one. *The State ex rel. Morris v. The Hannibal & St. Joseph Railway Co.*, 13.
2. MANDAMUS. Mandamus is an appropriate remedy to compel the restoration of a highway, by a railway, to its proper condition, and, in this respect, to require the company to perform its charter duties. *Ib.*
3. ———: RELATORS: PRIVATE CITIZENS. It is sufficient for the relators in such proceeding to show that they are citizens, and thus interested in the performance of a public duty. *Ib.*
4. RAILROAD: HIGHWAY, OBSTRUCTION OF. In a mandamus proceeding to compel a railway company to so construct its road as not to prevent the public from using a specified part of a highway, it is no defence that the track had formerly been placed in the highway by another railway company. Such fact is no justification of the continuance of the obstruction of the highway by defendant to the entire exclusion of the public. *Ib.*
5. ———: KILLING STOCK: PUBLIC CROSSING. In an action against a railroad for the negligent killing of plaintiff's cows by its trains, on a public crossing, mere proof that the speed of the trains was not checked, and that the cattle could have been seen eighty rods off, does not establish defendant's negligence. *Milburn v. The Kansas City, St. Joseph & Council Bluffs Railway Co.*, 104.

6. ——— : ——— : NEGLIGENCE OF OWNER. Where the owner of cattle sees them in danger on a railroad track, and can, by reasonable exertion, get them off, he is bound to do so, and if he does not, and they are injured by a passing train, he cannot recover. The owner, in such case, has no right to rely upon the performance of the duty which the law imposes on the company of giving warning signals. *Ib.*
  
7. NEGLIGENCE : RAILROAD : SPEED OF TRAINS. A railroad has the right to run its trains in excess of the usual rate of speed to make up lost time, but, in doing so, those in charge of the train should use greater vigilance and care to prevent accidents to workmen on the track. *Stephens v. The Hannibal & St. Joseph Railway Co.*, 221.
  
8. ——— : ——— : ———. Where an employe on the track is injured by a train so running at an unusual rate of speed, he cannot recover in the absence of evidence to show that the engineer did discover, or, by the exercise of care, could have discovered the plaintiff in time to have checked the train. *Ib.*
  
9. RAILROAD, CONSTRUCTION OF UPON PUBLIC HIGHWAY : STATUTE. A railway company cannot, under the statute (G. S., 1865, p. 233; R. S., 1879, sec. 765), construct its road along or upon a public highway, except with the consent of the county court, and if it does so without such consent, a court of equity will interfere and grant the county appropriate relief. *The State ex rel. Mahan v. The St. Louis, Keokuk & Northwestern Railway Co.*, 288.
  
10. ——— : ——— : LACHES. The profile and map of the route of the defendant company through the county was filed, as required by statute (G. S., 1865, p. 337), in the office of the clerk of the county court in April, 1878, and the present action to restrain the defendant from using the highway was instituted in January, 1882; *held*, there was no such delay on the part of the county as to preclude it from asserting its rights against the company. *Ib.*
  
11. PRACTICE : PARTIES : CONSIGNEE, RIGHT OF ACTION OF : RAILROAD : DAMAGES. The consignees of a car load of wheat screenings, shipped over a company's railroad, but which was destroyed before reaching its destination, may maintain an action against the railroad company for the recovery of damages for such destruction. *Kirkpatrick v. The Kansas City, St. Joseph & Council Bluffs Railway Company*, 341.
  
12. ——— : ——— : ——— : ———. Where the consignee of goods shipped upon a railroad pays the draft drawn on him by the shipper, and receives the bill of lading to which the draft is attached, and subsequently purchases the goods from the owner, he thereby becomes the real party in interest under the code. R. S., sec. 3462. And it makes no difference that the goods were destroyed before the absolute sale, as the property of the owner in them still continued and was the subject of the transfer, and the transferee could maintain action for damages for their destruction on the ground of such transfer.. *Ib.*
  
13. RAILROAD : CROSSING OUT OF REPAIR. Where a railroad owes no

duty to one to keep a private crossing in repair, he cannot recover for an injury sustained by his wagon thereon caused by the crossing being out of repair. *Mann v. The Chicago, Rock Island & Pacific Railroad Company*, 347.

14. ——— : ——— : NOTICE. A railroad is not liable for an injury resulting from its crossing being out of repair, unless it had notice of such fact, or the defect existed a sufficient length of time to justify the presumption of notice. *Ib.*
15. ——— : PASSENGER ALIGHTING FROM TRAIN: NEGLIGENCE. In an action against a railroad company by a passenger for injuries received in alighting from a train at the company's station, if the train did not stop a sufficient length of time to enable the plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was so started while plaintiff was in the act of alighting, whereby he was thrown down and injured, the company is liable for the injury. Affirming *Straus v. Kansas City, St. Joseph & Council Bluffs Railway Company*, 75 Mo. 185. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railway Company*, 421.
16. ——— : ——— : ———. If the train was stopped a sufficient length of time for plaintiff to conveniently alight, and without any fault of defendant's servants, he failed to do so, and the conductor not knowing, and not having reason to suspect that the plaintiff was in the act of alighting, caused the train to start while he was so alighting, the defendant would not be liable. *Ib.*
17. ——— : ——— : ———. If a conductor has reason to believe that any passenger who has reached his destination, though dilatory, may be in the act of alighting, and he starts his train without examination, or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, the company will be liable. *Ib.*
18. ——— : ACTION FOR DEATH OF PERSON: CONTRIBUTORY NEGLIGENCE. One who recklessly or carelessly goes upon the track of a railroad company, without looking or listening for an approaching train, and is thereby killed, when, by looking or listening, he would have been apprised of the approach of the train, is guilty of such contributory negligence as to preclude a recovery in an action for his death, notwithstanding the train was, at the time, running at a rate of speed forbidden by an ordinance of the city in which the accident occurred, and also failed to ring its bell. *Taylor v. The Missouri Pacific Railway Company*, 457.
19. ——— : CONDEMNATION PROCEEDING: LIFE ESTATE. The owner of a life estate in land condemned for a right of way for a railroad, is entitled to the same estate in the money paid into court under the condemnation proceedings. *The Kansas City, Springfield & Memphis Railway Co. v. Weaver*, 473.
20. ——— : ——— : ———. A judgment creditor of the remainderman in such life estate can assert no claim to any part of said money during the continuance of the life estate. *Ib.*

21. ——— : KILLING STOCK : JURISDICTION : JUSTICE OF PEACE. In an action brought before a justice of the peace against a railroad for double damages for killing stock, the fact that the killing occurred in the township where the suit was brought, or in an adjoining township, is a jurisdictional one. It is not sufficient that such jurisdictional fact be averred in the statement; it must also be shown by the evidence. *Backenstoe v. The Wabash, St. Louis & Pacific Railway Co.*, 492.
22. ——— : ——— : ———. Proof simply that the killing occurred within the corporate limits of a town is not sufficient to warrant the jury in finding that it occurred in the township charged in the statement. *Ib.*
23. DOUBLE DAMAGE ACT, CONSTITUTIONALITY OF. The former decisions of this court holding that the double damage act (R. S., sec. 809) is not in contravention of either the state or federal constitution, sustained. *Phillips v. The Missouri Pacific Railway Co.*, 540.
24. CONTRIBUTORY NEGLIGENCE : DEMURRER TO EVIDENCE. The evidence of the plaintiff in this case, which was an action for injuries received from defendant's train, in attempting to cross a street in the city of St. Louis, *held*, not to warrant a demurrer to the evidence for defendant, on the ground that it showed that plaintiff had failed to look or listen before attempting to cross the track. *Drain v. The St. Louis, Iron Mountain & Southern Railway Co.*, 574.
25. ——— : ———. Where the evidence of plaintiff, relied on to show that he was guilty of contributory negligence, is vague, ambiguous, and uncertain, and does not clearly, or conclusively show such negligence on his part, the case should not be taken from the jury. *Ib.*
26. ——— : NEGLIGENCE OF DEFENDANT AFTER DISCOVERY OF. Although one who is struck and killed by a train while standing on a railroad track is guilty of contributory negligence in so being in a place of peril and danger, yet the railroad will still be liable for the accident if its engineer discovered the danger of the deceased, and, after such discovery, by the use of any means within his power consistent with the safety of the train, could have avoided the injury. *Bell v. The Hannibal & St. Joseph Railway Co.*, 599.
27. PROXIMATE CAUSE. The failure of the engineer in such case to use the means possessed at the time and adequate to prevent the injury is the proximate cause of the accident. *Ib.*
28. THE PLEADINGS IN THIS CASE held to raise the question of the railroad's negligence after becoming aware of the danger of the deceased, and also, held that the evidence presented a proper question for the jury thereon. *Ib.*

*On re-hearing.*

29. UPON A REVIEW AND RECONSIDERATION of the whole case, held that the death of the deceased was occasioned directly and solely by

his own gross carelessness in going and remaining upon the railroad track, without looking, or listening for the approach of the train, and that there is no evidence in the record that the servants of defendant in charge of the engine and train could have avoided the injury after discovering the danger of the deceased, or that upon the discovery of his presence and peril upon the track they failed or omitted to use any means within their power to avoid and prevent the accident, and that, therefore, the demurrer to the evidence should have been sustained (Ray, J., dissenting). *Ib.*

30. RAILROADS: DOUBLE DAMAGE ACT, CONSTITUTIONALITY OF. The former decisions of this court, upholding the constitutionality of the double damage act, as regards both the constitution of this state and of the United States, sustained. *Hines v. The Missouri Pacific Railway Company*, 629.
31. ———: RECEIVER, ACTION AGAINST: CONTRACT. An action can be brought in a state court against a receiver of a railroad by permission of the United States court which appointed him, for the breach of a contract for the purchase of ties, made by the railroad before the appointment of the receiver. *Harding v. Nettleton*, 658.
32. RECEIVER: JUDGMENT. The judgment of the state court cannot be enforced against the property of the corporation in the hands of the receiver, but must be presented to the United States court for allowance, and the latter court will determine the manner and time of paying it out of the assets of the road. *Ib.*

#### REASONABLE TIME.

See ADMINISTRATION 2, 3.

#### RECEIVER.

1. PARTNERSHIP: RECEIVER, POWER OF COURT TO APPOINT: JURISDICTION. The circuit court has original jurisdiction in all matters of equity, and has inherent power, independent of any statute authorizing it, to appoint a receiver in the settlement of partnership affairs, where there is no statute depriving it of such power. *Cox v. Volkert*, 505.
2. RECEIVER, APPOINTMENT AND AUTHORITY OF. Where the order appointing a receiver gives him "full power to collect the rents, take care of and preserve the same," he is authorized thereby to collect the rents to become due after the appointment as well as those due at the date of the appointment. *Ib.*
3. RECEIVER, AUTHORITY OF TO SUE. Where a receiver brings suit in the court by which he was appointed, and prosecutes the same with its sanction, it is not necessary to produce an express order so to do. *Ib.*

4. RECEIVER, EFFECT OF APPOINTMENT : LESSOR AND LESSEE. The appointment of a receiver does not affect the rights of parties to a lease executed by those for whom he acts, and whatever defences, counter-claims, or set-offs, the lessee would have had in a suit by the lessors are available to the lessee, in a suit by the receiver, and the lessee may plead any failure of the lessors to perform their part of the contract. *Ib.*
5. RAILROAD : RECEIVER, ACTION AGAINST : CONTRACT. An action can be brought in a state court against a receiver of a railroad by permission of the United States court which appointed him, for the breach of a contract for the purchase of ties, made by the railroad before the appointment of the receiver. *Harding v. Nettleton*, 658.
6. RECEIVER : JUDGMENT. The judgment of the state court cannot be enforced against the property of the corporation in the hands of the receiver, but must be presented to the United States court for allowance, and the latter court will determine the manner and time of paying it out of the assets of the road. *Ib.*

REFeree.

1. ——— : REFEREE : CONTEMPT. The referee appointed to conduct the examination under Revised Statutes, section 2410, has authority to commit the execution debtor for contempt where he refuses to answer proper questions. *The State ex rel. Ames v. Barclay*, 55.
2. ——— : ——— : ———. The fact that the debtor was a grand juror at the time of the examination does not exempt him from the operation of the statute, he having appeared and submitted to such examination, and without having made any such suggestion, until after he refused to answer the questions on other grounds. *Ib.*

REMAINDER.

See LIFE ESTATE.

RENTS AND PROFITS.

1. WIDOW'S RIGHT TO MANSION HOUSE : DOWER : EJECTMENT : RENTS AND PROFITS. The widow has the right to remain in and enjoy the mansion house of her deceased husband, and the messuages and plantation thereto belonging, until dower is assigned to her ; this right can only be terminated by the assignment of dower, and ejectment will lie to enforce her right of possession to such lands, and she is entitled to the whole of the rents where there is no outstanding lease at the date of her husband's death. *Roberts v. Nelson*, 21.
2. DEATH OF WIDOW PENDING SUIT : REVIVAL IN NAME OF ADMINISTRATOR : EJECTMENT : DAMAGES. Where the widow dies, pending an action of ejectment by her for the recovery of possession of the mansion house and messuages, the suit may be revived in the name

of her administrator, and recovery had for rents and profits, by way of damages, to the time of her death. *Ib.*

#### REPLEVIN.

1. REPLEVIN: INSTRUCTIONS. A series of instructions, in an action for the recovery of specific personal property, approved. *Ingle v. Mudd*, 216.
2. ———: TORT, ASSIGNMENT OF. Replevin will lie for the possession of mules stolen from the owner in favor of his assignee of the right of action therefor. Following *Snyder v. Railway*, *post*, 613. *Doering v. Kenamore*, 588.

#### RESULTING TRUSTS.

See TRUSTS AND TRUSTEES, 6. 7.

#### RETROSPECTIVE LEGISLATION,

See CONSTITUTIONAL LAW.

#### ROADS AND HIGHWAYS.

1. RAILROAD: HIGHWAYS. It is the duty of a railroad company, without a statutory requirement to that effect, to so construct its road as not to prevent the public from using its highways, and this duty is a continuing one. *The State ex rel. Morris v. Hannibal & St. Joseph Railroad Company*, 13.
2. MANDAMUS. Mandamus is an appropriate remedy to compel the restoration of a highway, by a railway, to its proper condition, and, in this respect, to require the company to perform its charter duties. *Ib.*
3. ———: RELATORS: PRIVATE CITIZENS. It is sufficient for the relators in such proceeding to show that they are citizens and thus interested in the performance of a public duty. *Ib.*
4. RAILROAD: HIGHWAY, OBSTRUCTION OF. In a mandamus proceeding to compel a railway company to so construct its road as not to prevent the public from using a specified part of a highway, it is no defence that the track had formerly been placed in the highway by another railway company. Such fact is no justification of the continuance of the obstruction of the highway by defendant to the entire exclusion of the public. *Ib.*

#### ST. JOSEPH.

See STREET IMPROVEMENT.

## ST. JOSEPH BOARD OF PUBLIC SCHOOLS.

- ST. JOSEPH BOARD OF PUBLIC SCHOOLS : BONDS : AUTHORITY TO ISSUE.** The St. Joseph board of public schools had authority, by virtue of General Statutes, 1865, chapter 47, section 11, to issue, during the years 1868 and 1871, its bonds to raise money to build school houses; and, also, to issue its renewal refunding bonds, under Revised Statutes, 1879, section 7034. *The St. Joseph Board of Public Schools v. Gaylord*, 401.

## ST. LOUIS CITY.

1. **ST. LOUIS CITY : PUBLIC STREETS : WELLS.** The city of St. Louis has the right to abolish wells situated within the limits of its public streets. *Ferrenbach v. Turner*, 416.
2. ——— : **WELLS : LICENSE. REVOCATION OF.** The passage of an ordinance by the city, directing its street commissioner to fill up said wells, operates as a revocation of any license, express or implied, to construct the wells in the street. *Ib.*
3. ——— : ———. The city can abolish said wells at the public expense, and the persons who construct them are not entitled to compensation for their loss. *Ib.*

## SALE.

1. **JUDGMENT : EXECUTION : SALE.** A sale under an execution issued upon an original judgment, which conforms to a judgment *nunc pro tunc*, instead of such original judgment, is invalid. *Coe v. Ritter*, 277.
2. ——— : **SALE BY ASSIGNEE WITHOUT ORDER OF COURT.** The sale of property by the assignee without an order of court does not render the sale fraudulent, nor does such fact affect the validity of the deed of assignment. *Jeffries v. Bleckmann*, 350.
3. **CONDITIONAL SALE OF PERSONAL PROPERTY : STATUTE.** The vendor of personal property may contract with his vendee that the title shall remain in the former until the purchase price is paid, and such contract will be valid as against creditors of the vendee or purchasers from him with notice of the contract, although such condition was not evidenced by writing, executed and acknowledged by the vendee and recorded, as required by statute. R. S., secs. 2505, 2507. *Coover v. Johnson*, 533.
4. **HOMESTEAD, FAILURE OF OFFICER TO ASSIGN : SALE NOT VOID.** The failure of a sheriff, selling, under execution, land which contains a homestead, to assign such homestead to the debtor does not render the sale void. *Crisp v. Crisp*, 630.

5. ———. The court may, in ejectment brought for the premises by the purchaser at the sale, cause the homestead to be assigned. *Ib.*

See SHERIFF'S DEED 2, 3.

### SCHOOLS.

- ST. JOSEPH BOARD OF PUBLIC SCHOOLS: BONDS: AUTHORITY TO ISSUE. The St. Joseph board of public schools had authority, by virtue of General Statutes, 1865, chapter 47, section 11, to issue, during the years 1868 and 1871, its bonds to raise money to build school houses; and, also, to issue its renewal refunding bonds, under Revised Statutes, 1879, section 7034. *The St. Joseph Board of Public Schools v. Gaylord*, 401.

### SETTLEMENT.

- SETTLEMENT, IMPEACHMENT OF: NOTE. Where a settlement of accounts has taken place between parties and a note payable to a third person is given in satisfaction of the amount found to be due, in an action on such note by the indorsee, the maker, without bringing all the parties interested into court, cannot impeach such settlement, nor show that the note was without consideration. *The First National Bank of Hannibal v. The North Missouri Coal and Mining Company*, 125.

### SHERIFF'S DEED.

1. SHERIFF'S DEED: JUDGMENT: NOTICE: CITATION. A sheriff's deed, based upon certain judgments of the county court for principal and interest due upon township school bonds, under Revised Statutes, 1855, where such judgments recite a notice, but not a citation, as provided for by Revised Statutes, 1855, page 1425, section 29, is void. *Roberts v. Nelson*, 21.
2. ———: ———: SALE. Such deed is void where the sale under the judgment is made at the sitting of the county court, instead of during a term of the circuit court. *Ib.*
3. ———: ———: ———: DOWER. Where a sheriff's deed is based upon a judgment against the husband and a sale thereunder before his death, it will not deprive the widow of her dower, and until dower is assigned to her she will be entitled to the possession of the property. *Ib.*

### SIGNIFICATION OF TERMS.

- SIGNIFICATION OF TERMS. "Without notice" and "in good faith" are equivalent terms. *Cooter v. Johnson*, 533.

### SPECIAL LAW.

1. REVISED STATUTES, SECTION 2835, CONSTITUTIONALITY OF. Section

2835, of the Revised Statutes, is not in violation of article four, section fifty-three, subdivision seventeen, of the constitution of Missouri, prohibiting the general assembly from passing "any local or special law regulating the jurisdiction of justices of the peace," nor is it a special act because directed against railroads alone. *Phillips v. Missouri Pacific Railway Company*, 540.

2. SPECIAL LAW. An act of the legislature which applies to and embraces all of a class of persons who are or may come into like situations or circumstances, is not a special law. *Ib.*

SPECIFIC PERFORMANCE.

PAROL CONTRACT FOR SALE OF LANDS: SPECIFIC PERFORMANCE: STATUTE OF FRAUDS. Where one seeks the specific performance of a parol contract for the sale of land, and makes out a case of part performance sufficient to take the case out of the statute of frauds, the court should find the balance due on the purchase price, if any, and on payment of the same into court vest the title in the vendee. *Webb v. Toms*, 591.

STATUTES CITED AND CONSTRUED.

REVISED STATUTES OF 1879.

Section 292, see page 673.	Section 2121, see page 599.
Section 736, see pages 232, 466.	Section 2410, see page 55.
Section 765, see page 288.	Section 2505, see page 533.
Section 809, see page 540.	Section 2507, see page 533.
Section 938, see page 239.	Section 2693, see page 544.
Section 939, see page 239.	Section 2835, see page 540.
Section 995, see page 684.	Section 3052, see page 681.
Section 1262, see page 623.	Section 3248, see page 643.
Section 1263, see page 169.	Section 3296, see page 382.
Section 1691, see page 18.	Section 3469, see page 341.
Section 1772, see page 371.	Section 3671, see page 277.
Section 1773, see page 371.	Section 3705, see page 71.
Section 1891, see page 33.	Section 7034, see page 401.

WAGNER'S STATUTES, 1872.

Page 150, § 1, see page 350.

GENERAL STATUTES, 1865.

Chapter 41, p. 239, see page 357.

Chapter 47, § 11, see page 401.

Chapter 62, see page 357.

Page 328, § 11, see page 466.

## REVISED STATUTES, 1855.

Page 1425, § 29, see page 21.

## ACTS OF 1859.

Page 74, see page 466.

## ACTS OF 1881.

Page 171, see page 277.

## REVISED STATUTES OF UNITED STATES.

Section 2291, see page 501.

## STATUTE OF FRAUDS.

See Fraud, 4, 5.

## STOCKHOLDER.

1. CORPORATION : STOCKHOLDER : ABATEMENT. A proceeding by motion under Revised Statutes, section 736, to subject a stockholder to execution on a judgment against the corporation to the extent of the unpaid balance of his stock, does not abate on the death of the stockholder. *Marks v. Hardy*, 232.
2. MOTION AGAINST STOCKHOLDER FOR UNPAID STOCK SUBSCRIPTION : DEATH OF STOCKHOLDER. While such execution cannot issue against the estate of the deceased stockholder on the final adjudication on the motion, yet such adjudication may be regarded as a demand against the estate, and be classed as such. *Ib.*
3. ——— : RETURN OF NULLA BONA. If the officer having the execution against the corporation makes a part of the debt and returns the writ *nulla bona* as to the residue, a sufficient foundation is laid to proceed, under the statute, against the stockholder for such residue. *Ib.*
4. ——— : SHERIFF'S RETURN TO EXECUTION AGAINST CORPORATION. It is not necessary, in order that the stockholder may be proceeded against, that the sheriff's return to the execution against the corporation should negative the ownership of all property whatever by it. A fair and substantial *nulla bona* return is all that is required, *Ib.*

## STREET IMPROVEMENT.

1. STREET IMPROVEMENTS : TAX-BILLS, AMENDMENT OF. It was compe-

tent for the city engineer of the city of St. Joseph, after making out tax bills for macadamizing, curbing and guttering two streets, on discovering that the block had been subdivided into lots, to correct and certify anew the bills, and he could so do, whether he was out of office or was holding the same as his own successor. *Morley v. Weakley*, 451.

2. ——— : ——— : PLEADING. Although the petition stated that each lot was charged for the work done in front of it, and that the engineer computed the cost of the work done "in front of and adjoining the lot," and not for the proportionate share of the cost of the whole work, yet, as in this connection, the cost is alleged to have been that which is chargeable to the whole lot, and that the amount assessed was the proportionate cost of the work under the act authorizing it, and which act is sufficiently referred to, the petition is sufficient. *Ib.*
3. ORDINANCES : MAYOR : CONTRACT. The city ordinances did not require the mayor to act separately in awarding the contract, but that he should act in conjunction with the city council, as its presiding officer. *Ib.*
4. STREET IMPROVEMENT : BIDS, ADVERTISEMENT FOR. It was not necessary that the advertisements for bids should state the amount of work to be done where they showed the streets between which and on which the work was to be done, and stated the different classes of work. *Ib.*
5. ——— : SPECIFICATIONS : ORDINANCES. The ordinances, with respect to macadamizing, curbing and guttering, provide in detail, as to the material and manner of doing this class of work, and the general ordinance, requiring a plan or profile of the work with specifications to be on file where bids are advertised for any public improvement, has no application. The latter ordinance should not be construed to require the city engineer to do that by specifications which is clearly stated in the ordinance. *Ib.*
6. ——— : LOST BID : EVIDENCE. Where a bid for macadamizing, etc., a street is lost, the loss being shown, parol evidence of its contents is admissible, and the fact that no record, or an imperfect account of the bid was kept, will not prevent plaintiff from showing its true contents. *Ib.*

#### STREET RAILWAYS.

1. CITY OF KANSAS : STREET RAILWAYS : ORDINANCE. Section one of the ordinance of June 29, 1880, of the City of Kansas, relating to street railways, does not require such railways, or any officer thereof, to pave the street on which their cars are operated. *The City of Kansas v. Corrigan*, 67.
2. ORDINANCE : STREET RAILWAY COMPANY : CONTRACT. Where an ordinance of a city, which grants to a horse railway company the privilege of using its streets, requires such railway to keep portions of the street, on which it operates, in good repair, the city cannot, by

a subsequent ordinance, compel the company to pave such portions of its street with specified materials, or punish any one concerned for operating the cars of the company, where the paving was not done. Such later ordinance would be an interference with the contract between the city and the railway as contained in the ordinance granting the latter its franchise. *Ib.*

#### SUBSTITUTION.

See PARTIES, 2.

#### SUPERSEDEAS.

**ATTACHMENT : INTERPLEA : APPEAL : SUPERSEDEAS : EXECUTION, WHEN OFFICER NOT LIABLE FOR FAILURE TO LEVY.** The pendency of the appeal of an interpleader from the judgment of a justice of the peace in an action of attachment, where bond is given by the interpleader, operates as a *supersedeas* in the cause, and prevents the sale of the attached property pending such appeal, and an officer is not liable in such case for failure to levy an execution issued against the property interpleaded. *The State ex rel. Boyington v. Ranson*, 327.

#### TAX BILLS.

See STREET IMPROVEMENT, 1.

#### TAX DEED

1. **TAX DEED : STATUTE.** Where the statute prescribes a form for a tax deed, such form becomes a matter of substance and must be strictly followed. *Hopkins v. Scott*, 140.
2. ——— : ———. Where the statute provides that the tax deed shall be substantially in the form prescribed such form must be substantially, although not literally, complied with. *Ib.*
3. ——— : **OMISSION OF RECITALS PRESCRIBED BY STATUTE.** While it is not necessary, in the latter case, to make the recitals in the words employed in the prescribed form, yet it is necessary that the recitals required in such form be substantially made, and if not so made, such omission is fatal to the deed. *Ib.*
4. ——— : ———. The omission in a tax deed of the words, "for the payment of taxes, interest and costs then due and unpaid on said real property," is fatal to such deed, the statute having prescribed a form containing such recital and requiring that the deed should substantially comply with the form. *Ib.*
5. **STATUTE OF LIMITATIONS : VOID TAX DEED.** A tax deed omitting such recital is void on its face, and the special three years statute of limitations does not run in favor of the person holding possession under such deed. *Ib.*

## TENANTS IN COMMON.

CONSTRUCTION OF STATUTE : HOMESTEAD : TENANTS IN COMMON. Under section 2291, Revised Statutes of United States, where both father and mother die before perfecting an entry of a homestead, and receiving a patent therefor, their heirs are entitled to a patent upon making proof of the facts required by said section, and take as tenants in common. *Crumb v. Hambleton*, 501.

## TENOR.

See FORGERY, 3.

## TITLE.

1. EJECTMENT : TITLE. The elder title when the better one must prevail in an action of ejectment. *Farrar v. Heinrich*, 521.
2. TITLE BY ADVERSE POSSESSION. An actual, adverse, open, and continuous possession of land under a claim and color of right from 1836 to 1860 was sufficient, not only to bar recovery by those claiming under an elder title, but conferred title upon those claiming under such adverse possession. *Ib.*
3. TRESPASS : ADVERSE POSSESSION. When both parties claim title by possession under color of title, the origin of each being an act of trespass, the one being a trespass on the constructive possession and the other a trespass on the actual possession under the later title, the same rule of law as to the title passing by adverse possession applies to each. *Ib.*

## TITLE BOND.

1. LAND AND LAND TITLES : TITLE BOND. SURRENDER OF. The holder of a title bond to land, who surrenders it to him who executed it thereby obliterates whatever equitable right he may have theretofore had in the land. *Anderson v. McPike*, 293.
2. TITLE TO LAND : UNRECORDED TITLE BOND : NOTICE. A purchaser of land for value, without notice of an unrecorded title bond, will take a clear title against any right growing out of such bond. *Ib.*

## TORT.

1. REPLEVIN : TORT, ASSIGNMENT OF. Replevin will lie for the possession of mules stolen from the owner in favor of his assignee of the right of action therefor. Following *Snyder v. Railway*, post, 613. *Doering v. Kenamore*, 588.
2. TORT TO PROPERTY : ASSIGNABILITY OF ACTION FOR CODE. A right of action arising from a tort to property is assignable under the

code (overruling *Wallen v. Railway*, 74 Mo. 521). *Snyder v. The Wabash, St. Louis & Pacific Railway Co.*, 613.

### TRESPASS.

1. TRESPASS: POSSESSION. Possession of real estate is a pre-requisite to an action for trespass, and one who is not in possession cannot maintain the action. *Lindenbower v. Bentley*, 515.
2. ———: ———: LANDLORD AND TENANT. A tenant to whom land is rented, is entitled to its exclusive possession, and being in exclusive possession, the landlord out of possession cannot maintain trespass. *Ib.*
3. TRESPASS: ADVERSE POSSESSION. When both parties claim title by possession under color of title, the origin of each being an act of trespass, the one being a trespass on the constructive possession and the other a trespass on the actual possession under the later title, the same rule of law as to the title passing by adverse possession applies to each. *Farrar v. Heinrich*, 521.

### TRUSTS AND TRUSTEES.

1. TRUSTEE, PURCHASE BY OF OUTSTANDING TITLE. A trustee who holds the legal title for the benefit of another cannot speculate with the trust property. He cannot purchase an outstanding title and hold it for his own use, and it matters not that such title was acquired by purchase at a judicial sale, or that it is superior to the one conveyed to him in trust; and this rule is as applicable to a trustee holding the legal title to a railroad for the use of its bondholders as to other cases. *Baker v. The Springfield & Western Missouri Railway Company*, 75.
2. ———. Nor can a trustee, who has acquired such outstanding title require, in an action of ejectment for the railroad, the latter to refund to him the amount paid by him for such title. *Ib.*
3. AGENTS AND TRUSTEES: PROFITS MADE IN BUSINESS OF PRINCIPAL. An agent or trustee cannot unite in himself the opposite character of buyer and seller, and if he does so, the profits made by him may be charged with a trust for the benefit of the principal, unless the latter confirm the transaction with full knowledge of all the facts. So, too, if the agent make gains from the use of the trust funds or property, he must account therefor, and if the agent accept any benefits in conducting the business of his principal, he will hold them in trust for the latter. *Bent v. Priest*, 475.
4. DIRECTORS OF CORPORATION: AGENTS AND TRUSTEES. The directors of a corporation are trustees and agents of it and the stockholders, and, in general, are governed by the same rules as are applied to trustees and agents. *Ib.*
5. TRUSTS AND TRUSTEES. Where fiduciary relations exist between

partia., the trustee cannot purchase property in which his beneficiary has an interest, without such property becoming impressed in his hands with the nature of the trust, and it makes no difference that the trustee did not purchase at the sale, but afterwards and during the existence of such relations, took the bid of a stranger off his hands. *Shaw v. Shaw*, 594.

6. **RESULTING TRUSTS : STATUTE OF FRAUDS : EVIDENCE.** Resulting trusts are not within the statute of frauds, and parol evidence may be resorted to, to establish them, but to have that effect, such evidence must be almost conclusive in its character. *Ib.*
7. ——— : **PURCHASE MONEY.** The controlling question in the consideration of resulting trusts is the ownership of the purchase money. If such ownership be established in such manner as to leave no room for reasonable doubt in the mind of the chancellor, the resulting trust springs into being, by implication of law, and follows the ownership of the money. And the same rule holds as to a portion of the purchase money as to all of it, the resulting trust attaching in the ratio of ownership. *Ib.*
8. ——— : ——— : **PRACTICE : TRUSTEE.** So long as proceedings in bankruptcy are pending, the assignee is the only proper person to sue, and the creditors are bound to assert their rights as such by and through the assignee, who is a trustee for the creditors and the bankrupt, with power to collect the assets and convert the assigned property into money and distribute it among the creditors. When this is done and the proceedings are brought to an end his trust ceases, and whatever is left in his hands becomes the property of the bankrupt by operation of law, without any formal discharge of the assignee or re-transfer. *Peery v. Carnes*, 652.
9. ——— : **PRACTICE : BANKRUPT.** After the assignee's trust has ceased and the bankrupt has been discharged the latter is the proper party to sue for demands due himself, at the time he was adjudged a bankrupt. *Ib.*

#### VALUE.

**FALSE ASSERTION OF VALUE : WARRANTY : OPINION.** A mere false assertion of value, where no warranty is intended, is no ground of relief to a purchaser, because such assertion is a mere matter of opinion, which does not imply knowledge and is a thing about which men may differ. Mere expression of judgment or opinion does not amount to warranty. *Anderson v. McPike*, 293.

#### VENDOR'S LIEN.

See LIEN.

#### VENDOR AND VENDEE.

**LAND, PURCHASE OF : POSSESSION : VENDOR AND VENDEE.** Where the

vendor of land, at the time of contracting, refuses to put the vendees in possession, and the conveyance is accepted on such terms, it is not the vendor's duty to put the vendees in possession. *Anderson v. McPike*, 293.

#### VENUE.

1. ——— : VENUE, PROOF OF. Venue need not be proved by direct evidence, but may be proved indirectly. *The State v. Jackson*, 18.
2. ——— : LARCENY : VENUE. One who steals property in one county and takes it into another may be indicted, tried and convicted in the latter county. Where one steals cattle in one county, and they escape from him, and he pursues them into another county, and there takes possession of them as his property, and disposes of them, as such, he is guilty of stealing the property in the latter county. R. S., sec. 1691. *Ib.*
3. ——— : ——— : EVIDENCE : VENUE. The possession of a forged instrument, or the uttering of it in the county where the indictment is found, is strong evidence to show that the forgery of the instrument was committed by him in the same county. *The State v. Yerger*, 33.
4. ——— : CHANGE OF VENUE. The finding of the trial court in a criminal case, on the question of the prejudice of the inhabitants of the county, on the hearing of an application for a change of venue, will not be interfered with by the Supreme Court, unless palpable injustice has been done the defendant. *The State v. Holcomb*, 371.

#### VERDICT.

1. VERDICT. A verdict for plaintiff in ejectment is sufficiently definite in its description of the premises, if the boundary lines as fixed by the verdict can be traced thereon. *Bnse v. Russell*, 209.
2. ———. A verdict held not open to the objection of being too indefinite and uncertain. *Musser v. Adler*, 445.

#### VICE-PRINCIPAL.

See MASTER AND SERVANT, 4, 12.

#### WARRANTY.

FALSE ASSERTION OF VALUE : WARRANTY : OPINION. A mere false assertion of value, where no warranty is intended, is no ground of relief to a purchaser, because such assertion is a mere ~~matter~~ <sup>manifestation</sup> of opinion, which does not imply knowledge, and is a thing about which men may differ. Mere expression of judgment or opinion does not amount to warranty. *Anderson v. McPike*, 293.

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### WELLS.

See ST. LOUIS CITY.

### WEIGHT OF EVIDENCE.

1. PRACTICE IN SUPREME COURT: WEIGHT OF EVIDENCE. The Supreme Court will not pass upon the weight of the evidence, nor determine its credibility and value where it is conflicting, but will defer to the conclusions and findings of the trial court having the witnesses before it. *Anderson v. Griffith*, 549.
2. PRACTICE: WEIGHT OF EVIDENCE: DEMURRER. It is not the province of the court to determine the weight of the evidence, and where it is conflicting, a demurrer to the evidence, and instructions of a like character, are properly refused. *Covey v. The Hannibal & St. Joseph Railway Company*, 635.

### WITNESSES.

1. ———: EVIDENCE: OPINION OF WITNESS. It is not reversible error for a non-expert witness, who testifies to the facts in a case, to give an opinion based upon such facts. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railway Co.*, 421.
2. EVIDENCE: HUSBAND, COMPETENCY AS WITNESS. A husband, who is a co-plaintiff with his wife in an action under Revised Statutes, section 2121, for the death of their son, is a competent witness on the trial of the cause. *Bell v. The Hannibal & St. Joseph Railway Co.*, 509.